87-1365

No.

Supreme Court, U.S.
FILED
FEB 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH JOHN AIUPPA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALLAN A. ACKERMAN *
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

SANTO J. VOLPE
105 West Madison Street
Chicago, Illinois 60602
(312) 641-5411

Attorneys for Petitioner
Joseph John Aiuppa

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner was denied Fifth Amendment due process of law and Sixth Amendment right to a jury trial when, in an exceedingly complex conspiracy prosecution, the trial jury was instructed (over objection) . . . [that] *the presumption is that every person knows what the law forbids, and what the law requires to be done*? (Does not *Yates v. Aiken*, ____ U.S. ____, 108 S.Ct. 534, 536 (1988) mandate the granting of relief?)

2. Whether the Circuit Courts of Appeals decisions in both *United States v. Golitschek*, 808 F.2d 195 (CA 2, 1986) and *United States v. Davis*, 583 F.2d 190 (CA 5, 1978) demonstrate a split-in-circuits as to the above instruction?

3. Whether the Court of Appeals, in deciding this case committed appellate error while failing to apply the harmless-beyond a reasonable doubt test—while considering this constitutionally flawed pivotal jury instruction? (See *Rose v. Clark*, 478 U.S. ____, ____, 106 S.Ct. 3101, 3107-3109 (1986).

Note: Petitioner herein respectfully requests the Court's permission to incorporate issues raised by co-defendants Cerone, Rockman, LaPietra and Lombardo in their separate Petitions for Writs of Certiorari, filed in this Court, insofar as said issues may be determined to be applicable to the petitioner herein.

LIST OF PARTIES TO PROCEEDINGS BELOW

In the proceedings below, *United States v. Cerone, et al.*, 830 F.2d 938 (CA 8, 1987) the appellants were:

1. John Peter Cerone
2. Milton John Rockman
3. Angelo LaPietra
4. Joseph Lombardo
5. Joseph John Aiuppa, Petitioner herein.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
LIST OF PARTIES TO PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AMENDMENTS	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
STATEMENT OF PERTINENT FACTS	5
REASONS FOR GRANTING THE WRIT:	
1. Whether the petitioner was denied Fifth Amendment due process of law and Sixth Amendment right to a jury trial when, in an exceedingly complex conspiracy prosecution, the trial jury was instructed (over objection) . . . [that] *the presumption is that every person knows what the law forbids, and what the law requires to be done*?	11
2. Whether the Circuit Courts of Appeals decisions in both *United States v. Golitschek*, 808 F.2d 195 (CA 2, 1986) and *United States v. Davis*, 583 F.2d 190 (CA 5, 1978) demonstrate a split-in-circuits as to the above instruction?	12

3. Whether the Court of Appeals, in deciding this case committed appellate error while failing to apply the harmless—beyond a reasonable doubt test—while considering this constitutionally flawed pivotal jury instruction? (see *Rose v. Clark*, 478 U.S. ____, ____, 106 S.Ct. 3101, 3107-3109 (1986)) 16

CONCLUSION 18

APPENDICES

A— Opinion of the United States Court of Appeals for the Eighth Circuit, October 8, 1987 ... A-1

B— Order of the United States Court of Appeals Denying Petition for Rehearing, December 16, 1987 ..... B-1

C— Independent Evidence C-1

D— Grand Jury Indictment, Count One D-1

TABLE OF AUTHORITIES

Cases	PAGE
Brown v. Dugger, 831 F.2d 1547 (CA 11, 1987) ...	17
Chapman v. California, 386 U.S. 18 (1968) ...	16, 17, 18
Delaware v. Van Arsdall, 475 U.S. 673 (1986) ...	17
Duncan v. Louisiana, 391 U.S. 145 (1968)	14, 15
Francis v. Franklin, 471 U.S. 307 (1985)	13, 16
Fahey v. Connecticut, 375 U.S. 85, 84 S.Ct. 229 (1963)	17, 18
Greer v. Miller, 481 U.S. ____, 107 S.Ct. 3102 (1987)	13
Pinkerton v. United States, 328 U.S. 640 (1946) ..	9
Richardson v. Marsh, 481 U.S. ____, 107 S.Ct. 1702 (1987)	13
Rose v. Clark, 478 U.S. ____, 106 S.Ct. 3101 (1986)	16, 17
Sandstrom v. Montana, 442 U.S. 510 (1979) ..	12, 13, 16
Tanner v. United States, ____ U.S. ____, 107 S.Ct. 2739 (1987)	5
United States v. Cerone, 830 F.2d 938 (CA 8, 1987)	1, 4, 5, 16, 17, 18
United States v. Davis, 583 F.2d 190 (CA 5, 1978) .	12
United States v. DeLuna, 763 F.2d 897 (CA 8, 1985)	8, 15
United States v. Golitschek, 808 F.2d 195 (CA 2, 1986)	12, 13, 15
United States v. Granda, 565 F.2d 922 (CA 5, 1978)	16
United States v. Hastings, 461 U.S. 509 (1983) ..	17
United States v. Mallas, 762 F.2d 361 (CA 4, 1985)	16
United States v. Schilleci, 545 F.2d 519 (CA 5, 1977)	16

United States v. Schnaiderman, 568 F.2d 1208 (CA 5, 1978) 16
United States v. Thomas, 759 F.2d 659 (CA 8, 1985) 7
United States v. U.S. Gypsum Co., 438 U.S. 422 (1978) 13
United States v. Voss, 787 F.2d 393 (CA 8, 1986) . 14, 15
United States v. White Horse, 807 F.2d 1426 (CA 8, 1986) 15
United States v. Winston, 558 F.2d 105 (CA 2, 1977) 16
Yates v. Aiken, ___ U.S. ___, 108 S.Ct. 534 (1988) 11, 13

Constitutional Provisions

U.S. Constitution, Article III 2
U.S. Constitution, Fifth Amendment 2, 11, 19
U.S. Constitution, Sixth Amendment 2, 11, 14, 19

Statutes and Rules

Rule 20.1, U.S. Supreme Court Rules 2
18 U.S.C., Sec. 2 ..... 2, 4, 9
18 U.S.C., Sec. 371 ..... 3, 4, 12
18 U.S.C., Sec. 1952 ..... 3, 4, 9
28 U.S.C., Sec. 1254(1) 4

Other Authority

Devitt and Blackmar Federal Jury Practice and Instructions Manual, 3rd Ed., 1986 Supp. at pp. 261-264 (1987) 16

In The

Supreme Court of the United States

October Term, 1987

JOSEPH JOHN AIUPPA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported as *United States v. Cerone, et al.*, 830 F.2d 938 (CA 8, 1987). The opinion of the Court of Appeals was filed on October 8, 1987. A timely Petition for Rehearing with suggestions that the case is appropriate for *en banc* consideration was timely filed. The order denying Aiuppa's rehearing petition was entered on December 16, 1987.

The opinion of the United States Court of Appeals is reproduced as Appendix A-1 - A-25; the order declining rehearing is reproduced as Appendix B.

JURISDICTION

The opinion of the Court of Appeals (reproduced as Appendix A) was filed on October 8, 1987; a timely rehearing petition was denied by order of that same Court on December 16, 1987.

This Court's jurisdiction is invoked per 28 U.S.C., Section 1254(1) and Rule 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III, in part, states:

> The trial of all crimes . . . shall be by jury.

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

18 U.S.C., § 2:

> Principals
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C., § 371:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C., § 1952:

Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT OF THE CASE

On September 30, 1983 an eight (8) count indictment was returned in the U.S. District Court, Kansas City, Missouri. Petitioner, along with fourteen (14) other defendants were charged with violating 18 U.S.C., Section 371 (Count 1) and various Travel Act violations in Counts 2-8 . . . in violation of 18 U.S.C., Sections 2 and 1952.

Trial commenced on September 23, 1985 before the Honorable Joseph E. Stevens, Jr., and a jury in the U.S. District Court, Kansas City, Missouri. At the time the jury trial commenced there were nine (9) trial defendants. The case was submitted to the jury on January 17, 1986 as to the petitioner and the four (4) remaining trial defendants. On January 21, 1986 the jury returned guilty verdicts as to each of the eight (8) counts wherein the petitioner and his co-defendants were charged.[1]

On March 27, 1986, petitioner, then 78 years of age, was sentenced to 28½ years in custody in connection with the multiple convictions.[2]

---

[1] No issue is submitted in connection with the four (4) defendants who, for various reasons, did not have their cases submitted to the jury.

[2] The Court of Appeals, while affirming the petitioner's convictions and sentences nonetheless was troubled by the imposition of consecutive sentences. The Court of Appeals noted:

> "Nevertheless, we are troubled by the multiple sentences for convictions which, in essence, stemmed from the same activities, i.e., proof of Travel Act violations also served as proof of the conspiracy. The district court may wish to re-examine

(Footnote continued on following page)

STATEMENT OF PERTINENT FACTS

The eight (8) Count indictment naming petitioner and others was filed on September 30, 1983 in the U.S. District Court, Kansas City, Missouri. Count 1 of that indictment alleged a conspiracy (per 18 U.S.C., Sec. 371).[3] The gravamen of the conspiracy was that the petitioner and others, from approximately 1974 to the date that the indictment was returned, conspired to exercise a *hidden undisclosed interest* in certain gambling casinos located in Las Vegas, Nevada.[4] Those Casinos were part of the

---

[2] *continued*

its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences," (830 F.2d at 946, n. 8).

[3] Count 1, per 18 U.S.C., Sec. 371 lacked any nexus to the United States of America. Thus, this Court's decision in *Tanner v. United States*, ___ U.S. ___, 107 S.Ct. 2793, 2751 (1987) may undermine the viability of Count 1. *Tanner* was decided during the pendency of petitioner's appeal.

[4] The *sine qua non* of Count 1, and Counts 2-8 realistically involved the necessary allegation that the petitioner violated the technical and frequently inconsistent Nevada Gaming Regulations and the Nevada Gaming Act. Here, the trial judge instructed the jury, over objection, *that the petitioner was presumed to know that which the law forbid* . . . and, what was forbidden here was violations of the Nevada Gaming Regulations and Nevada Gaming Acts. The confusion generated by the gaming act and the gaming regulations resulted in multiple conferences as between the trial judge and all counsel and resulted in the trial judge taking 13 pages of the jury charge transcript to attempt to define for the jury the Nevada Gaming Regulations (Vol. 58, pp. 58-72). The pre-charge conferences as to the regulations cover over 100 pages of the transcript within Volumes 54, 56 and 57 of the trial transcripts in this case.

Argent Corporation, a corporation formed in 1974 by Allan Glick, the putative victim here. Glick, a businessman, sought to purchase certain Las Vegas Hotels and Casinos during 1973 and 1974. Eventually, Glick was able to secure financing for the purchase of both the Stardust and Fremont Hotels and Casinos via the Teamster Pension Fund providing a $62,000,000.00 loan to Glick in 1974. The government's evidence, taken in a light most favorable to the government, tended to show that certain of the defendants did assist Glick in getting the Teamster loan. The government nowhere alleged that petitioner had any part in the Glick-Teamster-loan process.[5]

The government offered evidence that after Glick had purchased the Stardust and Fremont Casinos during the spring and summer of 1974, a dispute arose between certain persons in connection with the unauthorized taking of monies from those casinos. Petitioner was not alleged to have any complicity whatsoever in these actions until said dispute; the government submitted evidence that the

---

[5] The Teamster Pension Fund pursuant to demands by the U.S. Department of Labor and the Internal Revenue Service delegated their authority over all their investments of the Teamster Pension Fund assets, on October 3, 1977 to two (2) independent investment managing groups; thus, after October 3, 1977 the trustees of the pension fund no longer controlled or managed the fund's assets (Vol. 18, pp. 64-71; Vol. 21, 18, 51-58). Thus the frailty of Count 1 is compounded by evidence submitted by the government . . . that the pension fund could not invest in Las Vegas or anywhere else after October 3, 1977. The indictment, on the other hand, alleged an ongoing conspiracy from approximately 1974 to the date the indictment was returned (September 30, 1983) but the government's proof demonstrated, beyond peradventure, that no one could control the pension fund investment process after October 3, 1977.

petitioner and another person were requested to resolve the dispute. According to the government, as a result of the petitioner's ability to resolve the dispute . . . thereafter . . . the petitioner was theoretically entitled to monies on a continuing basis (late 1974, early 1975?? the timeframe was never clarified). It is thus clear from the government's proof that petitioner played no role in Glick's securing of the 1974 Teamster/Pension Fund loan nor did petitioner play any role whatsoever in any of the events surrounding Glick's purchasing of the Stardust and Fremont Hotels and Casinos in Las Vegas, Nevada, in 1974.

The government offered no evidence that petitioner was ever in Las Vegas or ever participated with Glick in either the purchase or sale of the Argent properties; at best, the government offered evidence that petitioner met with certain co-conspirators.

The frailty of the government's prosecution as to the petitioner is further evidenced by the testimony of Carl Thomas; Thomas was hired by Glick to run the casinos during a period of time including 1976. Thomas, as a prosecution witness, testified that he gave monies taken from the Fremont and Hacienda Casinos to Frank Rosenthal, an uncharged individual in these proceedings.[6]

---

[6] The Thomas testimony was the only testimony throughout the four (4) month trial where monies were actually described as being taken from one or more of the Argent casinos. Thomas testified that on two (2) occasions he gave monies to Rosenthal; he did not know what Rosenthal did with the money and he did not implicate petitioner. Thomas as the only "theft of money" witness was a pivotal prosecution witness. Carl Thomas was the lead defendant in *United States v. Thomas*, 759 F.2d 659 (CA 8, 1985).

The primary evidence against petitioner consisted of notes, commonly called "DeLuna Notes." This collection of informal, coded scribblings were seized from the home of a guilty pleading co-defendant, Carl DeLuna on February 14, 1979.[7] The government on that date executed a search warrant at the DeLuna home and seized the writings, all authored by DeLuna. A prosecution witness interpreted the notes and ultimately decided that petitioner was #22 within DeLuna's private code (Vol. 13, pp. 152, 166-190).[8] As interpreted by a testifying F.B.I. agent, the notes allowed the jury to infer that petitioner, per these notes, played a role in decisions involving who would head the Teamsters Union and who owed money to whom. While these interpretations may have had substantial dramatic jury impact . . . they lent absolutely nothing to the demonstration of any probative reality insofar as petitioner's complicity in the indictment.[9]

Glick sold his Argent holdings in November 1979 for approximately $70,000,000.00 . . . he kept the monies, he split those monies with no one and his gambling interests

---

[7] Carl DeLuna aborted his trial in mid-trial in the instant case and entered a guilty plea to certain counts of the indictment. The "DeLuna Notes" were reviewed in *United States v. DeLuna*, 763 F.2d 897 (CA 8, 1985).

[8] Another F.B.I. Agent testified that he never heard of petitioner being referred to as #22, Vol. 9, p. 210.

[9] Petitioner was not heard on any intercepted conversations (Vol. 8, p. 135; Vol. 13, p. 153); there was neither handwriting nor fingerprints of the petitioner anywhere within the massive documentary evidence submitted within this case (Vol. 13, pp. 154, 194); the home of the petitioner was never searched and the petitioner was never seen in Las Vegas, Cleveland, Milwaukee or Kansas City . . . these locations being part and parcel of the thrust of the government's submitted conspiracy.

ended at the end of November 1979 (Vol. 31, pp. 705, 726-727, 754). Thus, the UNDISCLOSED HIDDEN INTEREST alleged in Count 1 of the indictment was hardly the subject of probative proof where the "victim," as an immunized prosecution witness, denied having any knowledge of any monies being taken from his casinos and further denied splitting any of the profits from the sale of his enterprises.[10]

The government agreed it had no evidence as to the petitioner in connection with any of the substantive counts (2 through 8 of the indictment; Counts wherein the Court imposed consecutive sentences amounting to 24 years in custody). Rather, during one of the charge conferences, the prosecution, while answering the trial judge as to their theory in connection with 2-8 . . . simply said, "*Pinkerton*" (Vol. 55, p. 10).[11]

---

[10] Glick also testified that when he originally was successful in getting the pension fund loan during the late spring and summer of 1974 he paid no bribes to anyone and gave no monies to any pension fund trustee in order to get that loan (Vol. 31, pp. 820-829).

[11] Counts 2-8, the substantive offenses, alleged violations of 18 U.S.C., Secs. 2 and 1952. None of these counts named petitioner as committing any acts. Examples of the substantive counts for which the petitioner suffered *Pinkerton consecutive* sentencing liability include Counts 5, 6 and 8 wherein those counts allege that Carl DeLuna (who pled guilty during trial) called Joe Agusto on November 16, 1978 (Count 5) DeLuna called Agusto on November 20, 1978 (Count 6) and DeLuna called Agusto on January 16, 1979 (Count 8). Petitioner, having been found guilty via *Pinkerton* of these counts received twelve (12) years in custody based on conduct the government never even intimated involved the petitioner.

Petitioner moved, absent success, for relief per Rule 29, both at the close of the prosecution's case and at the end of the case (Vol. 52, pp. 43, 159, 160).

Thus, the evidence submitted by the prosecution, during the four (4) month jury trial consisted solely of physical surveillance of petitioner on various occasions during 1978 and 1979 and the "DeLuna Notes." Our Appendix C demonstrates the totality of the evidence against petitioner as presented to the jury during the multi-month trial.

During a jury charge conference, the trial judge made the following statement:

> "THE UNLAWFUL ACTIVITY IN THIS CASE IS THE GAMING LAWS IN THE STATE OF NEVADA," (Vol. 52, p. 158).

Thus, the trial judge clearly recognized that which was at issue in the case (e.g., whether petitioner violated the Nevada Gaming regulations).[12]

---

[12] We append as Appendix D pp. 2 and 3 of Count 1 of the indictment in this case. In combination, the trial court's clear recognition of the issue coupled with the language in Count 1 clearly shows that the *sine qua non* of the government's indictment related to maintaining or attempting to maintain *undisclosed hidden ownership* in the Glick/Argent enterprise.

App. D-2 clearly shows the multiple Nevada Gaming Commission Rules and Nevada Gaming Control Statutes which are implicated within the fabric of this prosecution; these technical rules and statutes clearly show that the *presumption* instruction in this case could not be harmless error, beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

I.

The trial court, *inter alia*, charged the jury:

> *Instruction No. 76*
>
> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, *the presumption is that every person knows what the law forbids, and what the law requires to be done.* (Vol. 58, Tr. 74, 75; emphasis supplied).

The petitioner submits that an instruction like this violates both the Fifth and Sixth Amendments.

Recently, in *Yates v. Aiken*, ____ U.S. ____, 108 S.Ct. 534 (1988) the Court, per Justice Stevens, reaffirmed the proposition that the Due Process Clause protects the accused in circumstances where the State had the benefit of an evidentiary presumption within a jury charge. The Court noted:

> "The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' . . . This 'bedrock, "axiomatic and elementary" [constitutional] principle,' prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. . . . The prohibition protects the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in *Winship* that 'it is far worse to convict an innocent man than to let a guilty man go free.' " (108 S.Ct. at 536, citations omitted).

II.

Precious few federal circuit decisions have reviewed any similar instruction in recent years; those reviewing similar instructions have vacated convictions. In *United States v. Davis*, 583 F.2d 190 (CA 5, 1978) the Court, while reversing a series of conspiracy/exportation of weapon(s) convictions noted that such an instruction was forbidden. The instruction in *Davis* told that jury:

> "Unless outweighed by evidence to the contrary, the LAW *PRESUMES* THAT EVERY PERSON KNOWS WHAT THE LAW FORBIDS AND WHAT THE LAW REQUIRES TO BE DONE. Therefore, the evidence that the defendant acted or failed to act because of ignorance of the law does not constitute a defense," (583 F.2d at 193; emphasis supplied).[13]

In *United States v. Golitschek*, 808 F.2d 195 (CA 2, 1986) the court reviewed a strikingly similar presumption instruction while reversing a series of federal conspiracy convictions per 18 U.S.C., Secs. 371, 1001 and 1343. In part, the *Golitschek* Court noted, as regarding the jury instructions:

> "Thus, the jury was told that Golitschek could not be convicted unless the government proved that he knew that a transfer of the helicopters from Spain to Iran was prohibited by law, but was also told that every person is *presumed to know that the law forbids*," (808 F.2d at 202).

The Court of Appeals for the Second Circuit, while reversing the entire series of convictions as to *Golitschek* further noted:

---

[13] The series of instructions found prejudicial in *Davis* compare almost exactly with those in petitioner's case (Vol. 58, pp. 74, 75). *Davis* was decided prior to the Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979).

"Indeed, it is arguable that this prosecution of an Austrian citizen for actions taken in his own country is that rare case where it would be incorrect even to presume that the defendant is aware of the law punishing the offenses for which he is charged. Whether or not that is so, there is no doubt that he, *like a United States citizen charged with similar offenses occurring wholly in this country, may not be presumed to know the law that establishes the legal requirement that must be known in order to commit the offenses charged,*" (808 F.2d at 203; emphasis supplied).[14]

---

[14] The Court has recently held that the trial jury is [normally] presumed to follow the instructions of the Court, see *Richardson v. Marsh*, 481 U.S. ____, ____, 107 S.Ct. 1702, 1707 (1987) (Justice Stevens, with Justices Marshall and Brennan dissenting); *Greer v. Miller*, 481 U.S. ____, ____, 107 S.Ct. 3102, 3109, n. 8 (1987) (Stevens, J., concurring in the judgment; Justice Brennan with Justices Marshall and Blackmun, dissenting).

While the above decisions related to limiting or curative instructions, we suggest there can be no difference as between those cases and that at bar. If a jury is normally presumed to follow an instruction relating to inadmissible evidence, or the like, surely *this* jury was presumed to follow the PRESUMPTION instruction here given over multiple defense objections (Vol. 52, pp. 150, 151; Vol. 55, pp. 13-17; Vol. 57, pp. 57, 215, 216).

In *Yates v. Aiken*, ____ U.S. ____, 108 S.Ct. 534 (1988), the unanimous Court vacated the denial of relief below while reaffirming the substance of *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985). Both *Sandstrom* and *Francis* remain firm in their collective rulings that an instruction which allows the jury to "presume" . . . shifts the burden of proof and thus is infirm by virtue of the Fifth Amendment prohibition against shifting the burden of proof to the defendant. In accord, *United States v. U.S. Gypsum Company*, 438 U.S. 422, 98 S.Ct. at 2869, 2872, 2878 (1978).

Both *Sandstrom* and *Francis* mandate relief where the Court cannot determine whether a defendant was convicted on the basis of the unconstitutional instruction, *Sandstrom*, 442 U.S. at 526; *Francis*, 471 U.S. at ____, 105 S.Ct. at 1975, 1976, n.8.

(Footnote continued on following page)

Petitioner additionally submits that his right to trial by jury as guaranteed both by Article III, of the United States constitution and the Sixth Amendment was violated by virtue of the instant PRESUMPTION INSTRUCTION. In *Duncan v. Louisiana*, 391 U.S. 145 (1968) the court vacated certain local misdemeanor convictions while noting:

> "The guarantees of jury trial in the Federal and state Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the government," (391 U.S. at 155, n. 23 omitted).[15]

The *Duncan* Sixth Amendment analysis was the subject of confirmation in *United States v. Voss*, 787 F.2d 393 (CA 8, 1986). In *Voss*, the Court vacated in part, certain federal explosives convictions while stating:

> "*If the sixth amendment right to have a jury decide guilt and innocence means anything*, see Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), it means that the facts essential to conviction must be proven beyond the jury's reasonable doubt, not beyond ours. (cites omitted)

---

[14] *continued*

Within the fabric of petitioner's prosecution it is impossible to ascertain the effect of the unconstitutional instruction on the guilty verdicts not only as to Count 1, but also Counts 2 through 8 where, the prosecution acknowledged only *Pinkerton* liability, see Vol. 55, p. 10.

[15] Justice Black, joined by Justice Douglas concurred stating:

> "The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also guaranteed by the Fourteenth Amendment to defendants tried in state courts," (391 U.S. at 162).

> A jury verdict, if based on an instruction that allows it to convict without properly finding the facts supporting each element of the crime, is error. (cites omitted) *Such error is not corrected merely because an appellate court, upon review, is satisfied that the jury would have found the essential facts had it been properly instructed.*" (787 F.2d at 398, emphasis ours).[16]

Petitioner asserts that *Duncan v. Louisiana*, *ante* and the decisions in both *Voss* and *White Horse* unmistakably support the prejudicial error as to petitioner here. The critical elements of not only the conspiracy per Count 1, but the substantive counts depended upon the government's demonstration of knowledge as to the *complex and confusing* Nevada Gaming Regulations and Statutes.[17] Absent that knowledge there was no viable criminal offense. As the trial judge noted, during one of the instruction conferences:

> "The unlawful activity in this case is the gaming laws in the State of Nevada." (Vol. 52, p. 158)

Both the Fifth Circuit in *United States v. Davis*, 583 F.2d at 190, 194 (CA 5, 1978) and the Second Circuit in *United States v. Golitschek*, 808 F.2d 195, 202, 203 (CA 2, 1986) found strikingly similar *presumption* instructions forbidden; in each case those Courts of Appeals reversed

---

[16] The Sixth Amendment analysis finds additional support in *United States v. White Horse*, 807 F.2d 1426, 1429 (CA 8, 1986) ("A judge commits error when he instructs the jury as a matter of law that a fact essential to conviction has been established by the evidence, thus depriving the jury of the opportunity to make this finding").

[17] In part, some of the exceedingly changing and complex Nevada Gaming Regulations are reproduced at *United States v. DeLuna*, 763 F.2d at 925-942; these regulations, in part, are that which the petitioner here was presumed to know.

those multiple conviction sentences. Here, the Court seemingly found some or another error . . . but deemed same *harmless* . . . an appellate finding neither supported by the facts in the particular case nor sufficient to warrant the affirmation of the instant convictions (830 F.2d at 947).

Petitioner respectfully submits that the PRESUMPTION INSTRUCTION in this case having been clearly the subject of disapproval in the Second and Fifth Circuits should not now be allowed to remain as the viable lynch pin to support the frail convictions at bar.[18]

III.

THE FLAWED HARMLESS ERROR ANALYSIS

In *Rose v. Clark*, 478 U.S. ____, 106 S.Ct. 3101 (1986) the Court found, while remanding that case for further consideration, that the harmless error analysis per *Chapman v. California* applied. In connection with jury instructions that violated *Sandstrom* and *Franklin*. The harmless error doctrine in *Chapman* requires that:

> "Before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt," *Chapman*, 386 U.S. 18, 24, 87 S.Ct. at 828 (1967).

---

[18] Additional decisions which tend to demonstrate that such an instruction is totally impermissible include *United States v. Winston*, 558 F.2d 105 (CA 2, 1977); *United States v. Granda*, 565 F.2d 922 (CA 5, 1978); *United States v. Schnaiderman*, 568 F.2d 1208 (CA 5, 1978) and *United States v. Schilleci*, 545 F.2d 519 (CA 5, 1977), see also, *United States v. Mallas*, 762 F.2d 361 (CA 4, 1985).

The *Devitt and Blackmar Federal Jury Practice and Instructions* Manual, 3rd Ed., 1986 Supplement at pp. 261-264 collecting decisions on this general topic and these decisions no longer make reference to any federal decisions using the PRESUMPTION instruction as tendered, over objection, here.

This standard (harmless beyond a reasonable doubt) as set forth in *Chapman v. California* presumes prejudice and places the burden on the beneficiary of the error to prove, beyond a reasonable doubt that the error did not contribute to the verdict.[19]

The harmless error analysis, as per *Rose v. Clark* includes reference to the need for determination as to whether . . . on the whole record . . . the error is harmless beyond a reasonable doubt, see *Rose v. Clark*, ____ U.S. ____, 106 S.Ct. at 3109, citing, *United States v. Hastings*, 461 U.S. at 509, 510 (1983).[20]

The petitioner asserts that the Court of Appeals declined to apply the correct standard for review in two (2) separate ways:

(1) The Court of Appeals only assumed that the PRESUMPTION instruction was error (830 F.2d at 947) and

(2) The Court then stated . . . "we must examine the record to determine whether such an error is harmless" (830 F.2d at 947).

---

[19] *Chapman v. California*, 386 U.S. at 24, 87 S.Ct. at 828; *Fahey v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230 (1963).

In *Brown v. Dugger*, 831 F.2d 1547, 1554 (CA 11, 1987) that Court, while affirming the granting of relief per 28 U.S.C., Sec. 2254 reviewed the "harmless beyond a reasonable doubt" standard . . . 831 F.2d at 1554. In *Brown*, the Court, while affirming the granting of relief noted that the beneficiary of the errors in that case could not demonstrate, beyond a reasonable doubt, that the errors did not contribute to the verdict (*Id.* at 1555, 1558).

[20] A similar analysis was employed in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) where the Court found that constitutional error in connection with potential confrontation problems fell within the parameters of harmless-error [beyond a reasonable doubt] but remanded consideration of the question to the state court in the first instance (475 U.S. at ____, 106 S.Ct. at 1438) (Justice White concurring, Justices Marshall and Stevens dissenting).

The PRESUMPTION instruction was absolute error and the harmless *vel non* test was incorrectly applied. The true test, per the Court is whether the error was harmless beyond a reasonable doubt and whether the party having the benefit of the error could prove that the error did not contribute to the verdict (see *Chapman*, *ante*, 386 U.S. at 24, *Fahey*, 375 U.S. at 86-87).

Within the circumstances at bar it is unclear, at best, as to whether the Court of Appeals applied the correct standard; indeed, a review of the opinion below shows that it did *not* apply the correct standard. Hence Petitioner seeks an order on this issue vacating the convictions and sentences with a direction that the Court of Appeals re-evaluate the constitutional error against the harmless beyond a reasonable doubt standard.

CONCLUSION

The petitioner is 79 years old and serving a 28½ year sentence imposed in March, 1986.[21]

The petitioner submits that there is a clear split-in-Circuits as between the Second and Fifth Circuits which find the PRESUMPTION instruction such as that at bar to be manifest error while the Court in this case simply assumed error and thereafter applied an inappropriate appellate standard of review.

[21] The Court of Appeals noted that petitioner was serving a 21½ year sentence, 830 F.2d at 943. In our timely petition for rehearing we pointed out that error; the Court declined to correct that inaccuracy.

The petitioner thus seeks vacation of his convictions and sentences as to his first issue (the invalidity of the instruction per the Fifth and Sixth Amendments) with directions that a new trial be ordered. Petitioner would seek a vacation of his convictions and sentences with a directive that the Court of Appeals reconsider the *harmless error* analysis in connection with his second issue as submitted.

Petitioner, Joseph John Aiuppa, also requests that points raised in separate petitions for writs of certiorari arising from these same proceedings be incorporated herein insofar as this Court may determine those points to be applicable to petitioner Aiuppa.[22]

Respectfully submitted,

ALLAN A. ACKERMAN *
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

SANTO J. VOLPE
105 West Madison Street
Chicago, Illinois 60602
(312) 641-5411

Attorneys for Petitioner
Joseph John Aiuppa

* Counsel of Record

[22] Counsel for Aiuppa has been advised that separate petitions for writs of certiorari will be filed by his original co-appellants, John Peter Cerone, Milton John Rockman, Angelo LaPietra and Joseph Lombardo.

APPENDIX A

United States Court of Appeals

For the Eighth Circuit

No. 86-1439
United States of America,
Appellee,

v.

John Peter Cerone,
Appellant.

No. 86-1440
United States of America,
Appellee,

v.

Milton John Rockman,
Appellant.

No. 86-1441
United States of America,
Appellee,

v.

Joseph John Aiuppa,
Appellant.

No. 86-1442
United States of America,
Appellee,

v.

Angelo LaPietra,
Appellant.

No. 86-1443

United States of America,

Appellee,

v.

Joseph Lombardo,

Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: May 11, 1987
Filed: October 8, 1987

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

BRIGHT, Senior Circuit Judge.

John Peter Cerone, Joseph John Aiuppa, Joseph Lombardo, Angelo LaPietra and Milton John Rockman appeal their convictions for conspiracy to travel in interstate commerce and use interstate facilities with the intent to promote and carry on an illegal activity in violation of the Travel Act, 18 U.S.C. §§ 371, 1952, and on seven substantive Travel Act violations. The appellants raise nineteen allegations of error, some collectively, others individually. For the reasons discussed below, we affirm the convictions.

I. BACKGROUND

The indictment charged that the defendants and several unindicted co-conspirators sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and Fremont, in violation of Nevada gaming laws. These casinos were owned by the Argent

Corporation which, in turn, was owned by Allen R. Glick. Glick's purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators obtained control of Argent Corporation by helping Glick to obtain financing and by placing two of their people, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control of the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund along with Roy Williams, a Teamsters official.

The Government charged that the conspirators were able to control Argent and the Union because they were members of organized crime "groups" in various Midwestern cities. Aiuppa was the boss of the Chicago group, with Cerone as its underboss. LaPietra and Lombardo were members of the Chicago group, and Rockman was an associate of the Cleveland group.[1]

At trial, the Government introduced the testimony of Glick, Angelo Lonardo, a Cleveland underboss, Roy Williams and Carl Thomas, among others. The Government also produced evidence consisting of tape recordings, notes made by DeLuna, and surveillance testimony by FBI agents.

According to the Government's theory of the case, in early 1974, Frank Balistrieri agreed to help Allen Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Nick Civella and Milton Rockman, who each controlled a trustee of the pension fund. Glick then received his loan.

After Glick bought the casinos, Balistrieri and the others required Glick to promote Frank Rosenthal to a management position at Argent. Rosenthal supervised the skim-

---

[1] Co-conspirator Nick Civella headed the Kansis City group, and co-conspirator Frank Balistrieri was the head of the Milwaukee group.

ming of gambling proceeds from the casinos. Later, Carl Thomas was placed in charge of the operation for a short time.

Initially, the Kansas City, Milwaukee and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose between the groups, and the Chicago group stepped in to resolve the problem. Thereafter, the Chicago group, including appellants Aiuppa, Cerone, Lombardo and LaPietra shared the skimming proceeds.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. LaPietra became DeLuna's contact with the Chicago group after the death of a previous contact. Appellant Rockman also acted as a contact with DeLuna for the Cleveland group, and as an intermediary with the Chicago group.

Typically, the skimmed money was delivered from Las Vegas to Chicago. LaPietra delivered the skimmed money to Anthony Chiavola, Sr. of Chicago who, in turn, delivered the skimmed money to DeLuna for the Kansas City group and gave the Cleveland group's share to appellant Rockman.

During the period 1976 to 1979, Rosenthal had various widely publicized problems with the Nevada licensing authorities, who considered him to be unsuitable for working as a key employee of a casino. The conspirators were concerned that Rosenthal's problems might jeopardize their interests in Las Vegas casinos and in the skimming operations, and they had numerous conversations about replacing Rosenthal. During the same period, the conspirators also had problems with Allen Glick who was reluctant to accept their control of Argent through Rosenthal. Nick Civella and Carl DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal's direction. Glick yielded to their demands.

In October 1977, independent investment managers took over management of the pension fund's assets, which hindered the conspirators' ability to control the pension fund, to obtain loans and receive other favorable treatment. Thereafter, the conspirators, principally appellant Lombardo and Allen Dorfman, had numerous strategy discussions concerning their efforts to replace the independent managers and other individuals with persons controlled by the conspirators. From 1979 to 1981, the conspirators, including appellants Aiuppa, Cerone, Lombardo and Rockman, took measures to support Roy Williams to succeed Frank Fitzsimmons as Teamsters president and later to support Jackie Presser to succeed Williams in order to maintain the conspirators' influence with the Teamsters Union.

In 1978, DeLuna told Allen Glick that his "partners" were "sick of" dealing with him and that they would kill him unless he sold Argent Corporation. Thereafter, Glick publicly announced his intention to sell Argent and three groups began to negotiate with Glick to buy Argent. In December 1979, Glick sold Argent to Trans-Sterling, Inc.

From March 1978 to May 1980, law enforcement officials conducted many court authorized electronic surveillances of various telephones and locations in Kansas City, Missouri; Leavenworth, Kansas; Las Vegas, Nevada; Chicago, Illinois; and Milwaukee, Wisconsin, including the residences of Carl DeLuna, Anthony Civella, Joe Agosto, and Anthony Chiavola, Sr., and the business offices of Allen Dorfman. Lombardo, Rockman and LaPietra were intercepted during the electronic surveillances.

Law enforcement officials also conducted various court authorized searches and seizures of records and documents. For example, on February 14, 1979, officials seized address and phone books, papers, and other documents from Carl DeLuna's home in Kansas City, Missouri, which contained DeLuna's notes of meetings and telephone conversations among the conspirators, telephone numbers and disbursement of funds in connection with the skimming operation (hereinafter "the DeLuna notes").

On September 30, 1983, a grand jury in Kansas City, Missouri, returned an eight-count indictment against fifteen defendants, charging them with violations of 18 U.S.C. §§ 2, 371, 1952. Carl Civella, Peter Tamburello, Anthony Chiavola, Sr. and Anthony Chiavola, Jr. entered guilty pleas prior to trial. The district court[2] severed the case of Anthony Spilotro from the others, and he died several months after trial. Carl DeLuna and Frank Balistrieri pled guilty during trial. The court dismissed the indictment against Carl Thomas during trial, and he then testified as a government witness. After the close of the government's case, the court entered judgments of acquittal as to John and Joseph Balistrieri.

After a four-month trial, the jury returned guilty verdicts on all counts against the remaining defendants, Aiuppa, Cerone, Lombardo, LaPietra and Rockman. Aiuppa and Cerone were sentenced to consecutive prison terms totalling twenty and one-half years. Lombardo and LaPietra received consecutive sentences totalling sixteen years imprisonment. Rockman also received consecutive sentences, totalling twenty-four years. Each defendant was fined $80,000.

II. DISCUSSION

A. Sufficiency of the Evidence on Count I

All five appellants contend that the evidence was insufficient to convict them on Count I, conspiracy to maintain an undisclosed interest in the gaming interests of Allen Glick. They argue that the evidence failed to show their maintenance of a hidden interest. Rather, at most, the evidence showed a common purpose to skim money by extortion, embezzlement or theft. Some of the defendants contend that the evidence showed that they were merely collecting a "finder's fee" for their assistance to Glick in obtaining his pension fund loan.

---

[2] The Honorable Joseph E. Stevens, Jr., United States district Judge for the Eastern and Western Districts of Missouri.

When reviewing the sufficiency of the evidence for a criminal conviction, we must view the evidence in the light most favorable to the jury's verdict. *United States v. Randle*, 815 F.2d 505, 508 (8th Cir. 1987); *United States v. Roenigk*, 810 F.2d 809, 813 (8th Cir. 1987). So viewed, we determine that the evidence was sufficient to convict the appellants on count I as charged in the indictment.

Uncontradicted evidence showed that Frank Rosenthal obtained a managerial position with Argent, that he directed the skimming operation at the casinos and that he acted at the direction and for the benefit of the conspirators. Frank Balistrieri, Nick Civella and Rockman obtained this influence over Argent by arranging for Glick to receive the pension fund loan. All the appellants shared in the skimming proceeds and discussed the working of the operation among themselves. As this court held in *United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985), indirect receipt of gambling moneys without the necessary licenses and in violation of state law constitutes a violation of the Travel Act. 763 F.2d at 907. Furthermore, we note that the indictment here is nearly identical to that charged in the *DeLuna* case.[3] We are bound by *DeLuna*'s holding that evidence of the receipt of skimmed moneys from a Nevada casino serves as a sufficient basis to sustain the convictions under the Travel Act indictment. *Id.* at 906-07.

We also reject appellants' argument that a variance in proof existed from what was charged in the indictment. As discussed above, sufficient evidence existed to support the convictions as charged in the indictment. Furthermore, appellants can show no prejudice from any alleged variance. Prior to trial, several co-defendants challenged the indictment, claiming that the charges were the same as those on which they had previously been convicted in the so-called Tropicana case, *United States v. DeLuna, supra.* In response, the Government submitted a detailed offer

---

[3] *DeLuna* involved skimming from another Las Vegas casino, the Tropicana.

of proof as to what it expected to prove in this case. *United States v. Thomas*, 759 F.2d 659, 664-65 (8th Cir. 1985). With this sort of information, appellants can claim no prejudice or surprise from the evidence presented at trial.

B. *Pinkerton* Instruction

The appellants were indicted as aiders and abettors on seven substantive counts of violating the Travel Act. The court instructed the jury on theories of aiding and abetting, as well as vicarious liability under the doctrine of *Pinkerton v. United States*, 328 U.S. 640 (1946).[4] Appellants argue that the district court erred in submitting both theories to the jury. They contend that the evidence was insufficient to convict them of aiding and abetting. Consequently, the jury must have found them guilty by reason of vicarious liability. This, they claim, is improper because they cannot be convicted as principals under vicarious liability when they were indicted as accessories under an aiding and abetting theory.

Even assuming that the evidence failed to prove aiding and abetting, we do not agree with appellants' argument. Other circuits have held that persons indicted as aiders and abettors may be convicted pursuant to a *Pinkerton* instruction. *United States v. Meister*, 762 F.2d 867, 878 (11th Cir.), *cert. denied*, 106 S. Ct. 579 (1985); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984). Although appellants' argument may have some logical appeal, clearly the law fails to support their position.

---

[4] Under *Pinkerton*, a party to a continuing conspiracy may be responsible for substantive offenses in furtherance of the conspiracy even though that party does not participate or know of the substantive offenses.

C. Double Jeopardy

Appellants claim that their convictions for conspiracy and for substantive acts taken in furtherance of the conspiracy under a theory of vicarious liability violate the Double Jeopardy Clause of the Constitution.

It is well settled that no double jeopardy violation occurs when a person is convicted of conspiracy and a substantive overt act of the conspiracy. *Albernaz v. United States*, 450 U.S. 333, 344-45 n. 3 (1981); *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975). That the substantive conviction was obtained through a *Pinkerton* instruction is irrelevant. Rather, the focus must be on the offenses and whether each offense requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *see also Albernaz*, 450 U.S. at 337-39; *Whalen v. United States*, 445 U.S. 684, 691-93 (1980).

The elements of criminal conspiracy (count I) are: (1) an agreement to commit an illegal act; (2) an unlawful objective; and (3) an act done in furtherance of the conspiracy committed by at least one of the participants. *United States v. Raymond*, 793 F.2d 928, 931-32 & n. 3 (8th Cir. 1986).[5]

Counts II through VIII allege violations of 18 U.S.C. §§ 2, 1952, the elements of which are: (1) aiding and abetting; (2) the interstate travel or use of interstate facilities; (3) with intent; (4) to promote or manage an unlawful activity; and (5) the actual or attempted promotion or management of the unlawful activity. 18 U.S.C. §§ 2, 1952.[6]

---

[5] Count I alleged that appellants conspired to use interstate facilities to carry on the unlawful activity of maintaining an interest in the gambling operations of Allen Glick and indirectly receiving gambling proceeds without being licensed in violation of Nevada gaming laws. Appellants obtained this interest through their control of the Teamsters Union Pension Fund.

[6] Count II alleged that appellants aided and abetted Anthony Chiavola, Sr. on October 7, 1978 to travel and distribute unlawful gambling proceeds.

(Footnote continued on following page)

Upon analyzing the elements of the offenses, it is apparent that conspiracy includes an element that the substantive offense does not; namely, an agreement. Appellants, however, argue that the convictions violate the Double Jeopardy Clause because (1) under the *Pinkerton* theory of liability, conspiracy is an element of the substantive offenses, and (2) aiding and abetting requires or at least implies an agreement. Thus, under either of these arguments, double jeopardy is violated because each offense requires identical elements to be proven.

We cannot accept appellants' first argument. *Pinkerton* itself disposed of their argument. The Court there held that convictions for conspiracy and substantive acts committed in furtherance of the conspiracy do not violate the Double Jeopardy Clause, even though the substantive con-

---

[6] *continued*

Count III alleged that appellants aided and abetted Anthony Chiavola, Sr. on December 21, 1978 to make arrangements via telephone for meeting to discuss their interests in the gambling operation.

Count IV alleged that appellants aided and abetted Carl Thomas on November 13, 1978 to discuss by telephone with Nick Civella the operation of the unlawful gambling activity.

Count V alleged that appellants aided and abetted Carl DeLuna on November 16, 1978 to telephone and discuss a proposed change of ownership of Glick's casino with Joseph Agosto and the continuing receipt of unlawful gambling proceeds.

Count VI alleged that appellants aided and abetted Carl DeLuna on November 20, 1978 to telephone Joseph Agosto and discuss the unlawful skimming operation.

Count VII alleged that on January 11, 1978, John Cerone travelled to Kansas City to meet with Carl Civella, Carl DeLuna and Nick Civella to discuss the sale of Glick's casinos and their continuing skimming operation, and that the other appellants aided and abetted this act.

Count VIII alleged that appellants aided and abetted Carl DeLuna on January 16, 1979 to telephone Joseph Agosto and discuss a message to Joseph Aiuppa, the visit of John Cerone, Glick's casinos and the unlawful skimming operation.

viction was obtained solely by means of participation in the conspiracy. *Pinkerton*, 328 U.S. at 646-47. We are bound by *Pinkerton*.

Appellants' second argument in this regard is somewhat more difficult. They contend that the substantive offenses also require proof of an agreement because aiding and abetting implies that at least two people are involved and agree to be involved.[7] Thus, the substantive offenses and the conspiracy count require the same elements to be proven.

However, as the Supreme Court noted in *Iannelli*, agreement remains the essential element of (conspiracy) crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact. 420 U.S. at 777, n.10.

Appellants are essentially advancing the application of Wharton's Rule, which requires merger of the substantive offense and the conspiracy when the substantive crime requires two or more persons for its commission. *Iannelli v. United States*, 420 U.S. 770, 773 & n. 5 (1975). The Rule itself does not rest on double jeopardy principles. *Id.* at 782. The Supreme Court has determined that Wharton's Rule is merely an aid in determining whether Congress intended to create separate offenses. *Id.* at 786. The Court noted that the crimes to which Wharton's Rule classically applied have three general characteristics: (1) general congruence of the agreement and the substantive offense; (2) the parties to the agreement are the only ones who commit the substantive offenses; and (3) the consequences of the substantive crime rest on the parties rather than society while the conspiracy does not pose the threats to society that the law of conspiracy seeks to avoid. *Id.* at 782-83.

---

[7] Except for count II, the substantive offenses by themselves require two or more individuals to act together and thus imply an agreement.

Using these factors and examining legislative intent, the *Iannelli* Court analyzed a closely analogous offense to that charged here, 18 U.S.C. § 1955. The Court determined that Wharton's Rule does not apply to section 1955. Furthermore, the legislative intent behind the Organized Crime Control Act of 1970, of which section 1955 is a part, demonstrates a clear legislative judgment to punish conspiracy and the substantive offense as separate crimes. *Id.* at 791.

Applying these considerations to the present case, it is clear that Wharton's Rule does not operate to merge the conspiracy and the substantive offenses. Although the parties to the agreement are the same as those committing the substantive crimes, the conspiracy and substantive offenses are not generally congruent. The conspiracy contemplates a scheme much greater in scope than that encompassed by the substantive offenses. Furthermore, the consequences of the substantive crimes do not rest solely on the parties, rather society at large is affected.

Most importantly, the legislative history underlying the Travel Act indicates that Congress did not intent conspiracy to merge with aiding and abetting a Travel Act offense. The Travel Act was enacted to provide federal assistance in the prosecution of organized crime. H.R. Rep. No. 966, 87th Cong., 1st Sess. 2, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2665. Congress specifically intended that the Travel Act be prosecuted in conjunction with the aiding and abetting statute so that those who directed others to carry out their illegal missions could be prosecuted. H.R. Rep. No. 966, 87th Cong., 1st Sess. 3, *reprinted in* 1961 U.S. Code Cong. & Admin. News 2664, 2666. In addition, conspiracy was proposed as an element of section 1952, but was rejected. 107 Cong. Rec. 13,943 (1961). Accordingly, we believe Congress intended that aiding and abetting a Travel Act offense be a separate offense from conspiracy, and double jeopardy principles are not violated by a prosecution for both offenses.

Thus, under either theory presented by appellants, the Double Jeopardy Clause has not been violated.[8]

D. Jury Instruction

Appellants argue that the district court erroneously instructed the jury on intent. Specifically, they contend that the following instructions are erroneous:

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement or act made or done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

Jury Instruction No. 74; and

> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

Jury Instruction No. 76.

Appellants contend that these instructions impermissibly shifter the burden of proof from the Government to the

---

[8] Nevertheless, we are troubled by the multiple sentences for convictions which, in essence, stemmed from the same activities, i.e., proof of Travel Act violations also serve as proof of the conspiracy. The district court may wish to reexamine its imposition of consecutive sentences in light of these comments if appellants file a Rule 35 motion seeking modification of the sentences.

defendants and thus violated their due process rights. We do not agree.

First, Instruction No. 74 merely instructs the jury that it may find that a person intends the natural and probable consequences of his knowingly done acts. The creation of this inference does not necessarily violate due process. *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985); *see also Sandstrom v. Montana*, 442 U.S. 510, 515 (1979). The challenged instruction violates due process only if "the conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Id.*

Applying this standard to the present case, it is clear that Instruction No. 74 does not relieve the Government of its burden to prove intent. Rather, it allows the jury to make an inference as to intent. Furthermore, the instruction immediately reminds the jury that the inference is merely permissive and that "it is entirely up to [the jury] to decide what facts to find from the evidence." Accordingly, Instruction No. 74 does not violate appellants' due process rights.

Instruction No. 76 presents a more difficult issue. Appellants contend that because the Travel Act offenses are specific intent crimes, the district court erred when it instructed the jury that every person is presumed to know the law.

Although we agree with appellants that the substantive Travel Act offenses are specific intent crimes, it does not follow that the challenged instruction is erroneous. The Government need not show that appellants knew that a law existed to penalize their conduct. *United States v. Golitschek*, 808 F.2d 195, 202 (2d Cir. 1986). Sometimes, however, a specific intent crime requires that the defendant have knowledge of a legal requirement. *Id.*

In this case, appellants present a difficult issue. Knowledge of the licensing requirements under Nevada law would appear to be required for the Travel Act offenses. Instruction No. 76, however, seems to negate the Government's burden of proof in this regard.

Assuming that this instruction is erroneous, we must examine the record to determine whether such an error is harmless. *Rose v. Clark*, 106 S. Ct. 3101, 3107 (1986). Reviewing the record as a whole, we cannot say that the appellants received an unfair trial or that this error affected the composition of the record. The challenged instruction did not create a conclusive presumption, and another instruction advised the jury that the Government had to prove that appellants "knowingly did an act which the law forbids, purposely intending to violate the law." Jury Instruction No. 73. Moreover, the Government adduces ample evidence for the jury to find specific intent. Thus, in light of the record as a whole, any error in the jury instruction that may have introduced a confusing element as to the Government's burden of proving specific intent amounts to harmless error in this case.

E. Disclosure of Informants

Appellants argue that they were deprived of a fair trial because the district court refused to disclose the identity of two confidential informants. Prior to trial, the appellants asked for the identity of the informants and any statements they made, stating that such information "may be relevant and helpful to the defense."

The district court examined various statements and reports *in camera* and also interviewed one of the confidential informants. The court found that one informant did not convey any information to the FBI that was relevant or helpful to the defense. The other informant conveyed information that was used by the FBI to establish probable cause for court-ordered surveillance. The court concluded that disclosure was not required in light of the circumstances of this case, the need for the informants' safety and the information they conveyed.

The district court did not abuse its discretion by refusing to disclose the identity of the confidential informants. In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court stated the governing test for disclosure.

When disclosure of an informant's identity would be material and helpful, the public interest in protecting the flow of information is overcome. *Id.* at 60-62. The defendant has the burden of showing materiality. *United States v. Grisham*, 748 F.2d 460, 463-64 (8th Cir. 1984). Because such a showing may be difficult, the district court may hold an *in camera* proceeding to determine materiality. *Id.* at 464.

In the present case, the appellants only speculated that the confidential informants could provide them with relevant and helpful information. Nonetheless, the district court examined the confidential information *in camera* and concluded that disclosure was not warranted. In reaching its conclusion, the court correctly applied the *Roviaro* test and looked to the circumstances of the case. Accordingly, the district court did not abuse its discretion when it refused to order disclosure of the informants' identity.[9]

We are troubled, however, by the Government's admission on appeal that one of the informants actually testified at trial. This admission apparently came as a surprise to the appellants. The Government, however, has indicated that it informed the appellants at trial that one of the witnesses was a confidential informant.

This incident does not warrant reversal of appellants' convictions. The Government provided all the necessary information to defendants prior to the witness' testimony, and the defendants conducted a thorough cross-examination. Appellants have demonstrated no prejudice from the Government's later use of an undisclosed confidential informant as a witness. Accordingly, the district court's refusal to disclose the informant's identity and the Gov-

---

[9] In addition, other relevant factors relating to the safety of the witnesses cautioned against disclosure. In 1982, Frank Rosenthal's car was bombed. In 1983, Allen Dorfman was shot and killed. In 1986, the bodies of co-defendant Anthony Spilotro and his brother were discovered in an Indiana cornfield. In light of the physical danger of the informants and the lack of materiality, the court's decision reflects an appropriate balancing of interests.

ernment's subsequent disclosure that one of the informants testified does not constitute any reversible error.

Admission of Uncharged Crimes

Appellants argue that in numerous instances the district court erroneously admitted evidence of "other bad acts." Among other things, appellants challenge the admission of the statement that Allen Dorfman "was shot dead on the street," and prosecution's presentation of testimony by Angelo Lonardo, Ken Eto, Roy Williams and Aladena Fratianno. In this argument, the defendants also allege error in the introduction of the DeLuna Notes that were also admitted at the prior Tropicana trial.

These contentions lack merit. Appellant Lombardo's counsel elicited the statement about Dorfman and no objection was made. Improper testimony by Lonardo was stricken from the record, and the court properly instructed the jury to disregard Lonardo's improper responses. The testimony of Williams, Eto and Fratianno did not implicate appellants in other crimes. Although the DeLuna notes were admitted in another trial to prove a different conspiracy, the notes admitted in the present case were relevant to prove the conspiracy charged. There is nothing impermissible in using the same evidence to prove two separate crimes. Evidence that is probative of the crime charged and not relevant solely to uncharged crimes is not "other crimes" evidence. *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir. 1985). We determine that the district court committed no error as to the challenged evidence.

G. Admission of Co-Conspirator Statements

All the appellants argue that insufficient evidence independent of co-conspirator statements existed and thus the co-conspirator statements, including the DeLuna notes, should not have been admitted. Without these statements, appellants argue that insufficient evidence exists to support their convictions.

We note that the admissibility of co-conspirator statements is determined by the trial judge and he may consider any relevant evidence in this determination, including the hearsay statements sought to be admitted. *Bourjaily v. United States*, 107 S. Ct. 2775, 2780-82 (1987). Furthermore, the trial court need only determine that a conspiracy existed and that a defendant participated in it. The court is not required to independently inquire into the reliability of the co-conspirator statement. *Id.* at 2782-83.

Accordingly, appellants' argument that the co-conspirator statements should not have been admitted because no independent evidence existed to show a conspiracy, and their participation in it, must be rejected.[10] Thus, the evidence, when viewed in the light most favorable to the Government, is sufficient to support appellants' convictions.

H. Admission of DeLuna Notes

Appellant Aiuppa argues that the DeLuna notes were improperly admitted against him. He claims that the notes were not properly authenticated, were not in furtherance of the conspiracy, insufficient independent evidence connected him to the conspiracy, and the notes' admission violated his sixth amendment confrontation rights.

As noted above, *Bourjaily v. United States, supra*, disposes of several of Aiuppa's arguments. It is not necessary that solely independent evidence connect Aiuppa to the conspiracy. Rather, the notes themselves may aid in the connection. 107 S. Ct. at 2782. Nor does their admission violate Aiuppa's confrontation rights. Because the notes were admissible as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), *DeLuna*, 763 F.2d at 909, Aiuppa's confrontation rights were not violated. The re-

[10] In addition, we observe that the Government produced direct evidence of the conspiracy and appellants' participation in it. Allen Glick and Angelo Lonardo testified to their personal knowledge of the appellants' activities.

quirements for admission under the Federal Rules of Evidence are essentially the same as the confrontation clause requirements. *Bourjaily*, 107 S. Ct. at 2782.

In addition, the evidence shows authentication of the DeLuna notes. An analysis of the notes seized in a search of DeLuna's home revealed that DeLuna had written the notes. The notes carried DeLuna's fingerprints. Thus, the notes were properly authenticated as declarations of a co-conspirator. *See DeLuna*, 763 F.2d at 908-09; *United States v. Helmel*, 769 F.2d 1306, 1312 (8th Cir. 1985). The notes were also in furtherance of the conspiracy. They documented numerous meetings among the conspirators and other events, which were corroborated by surveillance and testimony of several witnesses. Accordingly, the district court committed no error in admitting the DeLuna notes.

I. Voice Identification

Appellant LaPietra argues that the Government failed to adequately identify his voice in several tape recorded phone calls and accordingly, those tapes may not be used to connect him with the conspiracy.

The district court did not err when it allowed the identification of LaPietra's voice. FBI Agent Thomeczek testified as to his supervision of the recordings and that he listened to all tapes used as exhibits. He also spoke with LaPietra several times after the indictment was issued and testified that the voice in question was that of LaPietra.

Any person may identify a speaker's voice if he has heard the voice at any time. *United States v. Smith*, 635 F.2d 716, 719 (8th Cir. 1980); *United States v. Vitale*, 549 F.2d 71, 73 (8th Cir.), *cert. denied*, 431 U.S. 907 (1977) (per curiam). Minimal familiarity is sufficient for admissibility purposes. Attacks on the accuracy of the identification go to the weight of the evidence, and the issue is for the jury to decide. *Smith*, 635 F.2d at 719; *Vitale*, 549 F.2d at 73.

Accordingly, the district court did not abuse its discretion when it admitted the identification of LaPietra's voice into evidence.[11]

J. Withdrawal of Overt Act 51 From Jury Consideration

LaPietra also contends that the district court erred when it instructed the jury to disregard overt act 51. At trial, it was admitted that LaPietra's voice was misidentified in the phone call constituting overt act 51. LaPietra argues that the court's instruction prevented the jury from considering exculpatory evidence because the misidentification was helpful to his defense.

We cannot agree with LaPietra's contention. The court did not instruct the jury to disregard evidence of misidentification. Rather, the court instructed the jury to consider LaPietra's defense of voice misidentification and to determine whether the identification was reliable under the circumstances. Jury Instruction No. 92. Accordingly, the court did not deprive LaPietra of his defense.

K. Conspiracy Instruction

Appellant Cerone argues that the district court erroneously instructed the jury that the defendants were guilty of conspiracy if they aided and abetted a substantive count. Alternatively, Lombardo contends that the district court erred by failing to limit the aiding and abetting instructions to the substantive counts.

Upon examining the jury instructions, we determine that appellants' arguments are without merit. The court correctly instructed the jury on the elements of conspiracy. The court then explained the three essential ele-

---

[11] LaPietra also argues that the evidence failed to show that he drove a car under surveillance on August 16, 1978. This argument is irrelevant because LaPietra was not charged with driving the car. The only relevant event for that date was a meeting among several co-conspirators, one of whom was LaPietra.

ments of the Travel Act so that the jury could consider the objects of the conspiracy. The aiding and abetting language refers to the substantive Travel Act offenses, not conspiracy. Furthermore, the court clearly instructed the jury that the "gist of the offense" was an agreement. Accordingly, the district court did not commit prejudicial error in its conspiracy instructions.

L. Cerone's Conviction on Count VII

Appellant Cerone argues that the evidence fails to prove that he traveled from Chicago to Kansas City for illegal purposes as alleged in count VII of the indictment. He contends that, at most, the evidence showed he traveled from Kansas City to Chicago. Because the evidence failed to support the offense charged in the indictment, Cerone argues that his conviction must be reversed.

Viewed in the light most favorable to the Government, the evidence showed that Cerone lived in Chicago and was observed leaving Kansas City on January 11, 1979 and arriving at the Chicago airport later that day. Earlier the same day, FBI agents observed Carl DeLuna pick up two unidentified men at the Kansas City airport. They later arrived at Anthony Civella's residence. DeLuna later drove Cerone to the airport in the same car observed earlier. In addition, a DeLuna note recorded that DeLuna met with Cerone and Civella on January 11, 1979 to discuss negotiations to buy Argent. Thus, although no direct evidence established the Chicago to Kansas City flight, the circumstances would enable the jury to infer that Cerone traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation. Accordingly, a reasonable jury could convict Cerone on count VII, and we sustain his conviction.

M. Identity of LaPietra's Code Name

LaPietra argues that the district court erred when it allowed FBI Agent Ouseley to testify as an expert wit-

ness and identify LaPietra as having the code name "Pitsacuni." He contends that Ouseley was not sufficiently qualified as an expert and that the evidence failed to support Ouseley's conclusion that LaPietra was "Pitsacuni."[12]

A witness may testify as an expert if the "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue * * *." Fed. R. Evid. 702; *Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723, 728 (8th Cir. 1985). The trial court's determination of whether a witness qualifies as an expert will not be reversed absent an abuse of discretion. *Federal Crop Ins.*, 765 F.2d at 728; *Cashman v. Allied Products Corp.*, 761 F.2d 1250, 1254 (8th Cir. 1985). A witness may be qualified as an expert based on practical experience. *Circle J Dairy, Inc. v. A. O. Smith Harvestore Prods.*, 790 F.2d 694, 700 (8th Cir. 1986); *Federal Crop Ins.*, 765 F.2d at 728.

Agent Ouseley testified that he had been an FBI agent for twenty-five years, had attended training schools, and had previously testified twelve times as an expert on the use of codes. In these circumstances, the district court did not abuse its discretion in allowing Ouseley to testify as an expert.

LaPietra's argument that the evidence did not support Ouseley's conclusion that Pitsacuni was LaPietra's code name speaks to the weight of Ouseley's opinion, not its admissibility. He was thoroughly cross-examined about the evidence upon which he based his opinion. Furthermore, the district court instructed the jury that expert testimony should be considered just like any other testimony and be given whatever weight the jury finds appropriate in light of the expert's qualifications and all the other evidence. Accordingly, we reject LaPietra's claim.

---

[12] LaPietra also asserts that the identification is based entirely on co-conspirator hearsay statements and that he is shown to be a member of the conspiracy through these same hearsay statements. As noted above, the trial court may consider hearsay statements in making preliminary determinations concerning admissibility of evidence. *Bourjaily*, 107 S. Ct. at 2780. Accordingly, LaPietra's argument in this regard is without merit.

N. Sufficiency of Travel Act Indictment

Appellant Lombardo alleges that the substantive counts of the Travel Act in the indictment fail to specify the particular acts that the defendants did in furtherance of illegal activity.

We reject Lombardo's contention. Generally, an indictment is sufficient if it sets forth the offense in the statutory language, provided that the statute sets out the necessary elements of the offense. *United States v. McKnight*, 799 F.2d 443, 445 (8th Cir. 1986). Nonetheless, the defendant is entitled to a short, concise statement of facts constituting the offense charged, but he is not entitled to know the evidentiary details with which the government intends to convict him. *United States v. Gordon*, 780 F.2d 1165, 1169 (5th Cir. 1986); *McKnight*, 799 F.2d at 445. In the present case, the indictments contained lengthy statements of fact, and Lombardo clearly cannot claim inadequate notice of the acts with which he was charged. *See supra*, notes 6-7.

O. District Court's Admonition to Lombardo's Attorney

Lombardo argues that he was unfairly prejudiced by the district court's admonition to his attorney, Mr. Oliver, in the presence of the jury. During cross-examination, FBI Agent Palmer testified that he had observed Lombardo driving a red and white vehicle and that he learned the car was registered to Lombardo. Mr. Oliver then asked Palmer "would it surprise you to learn [Lombardo] had never owned a red and white car?" The court then asked Mr. Oliver if he, as an officer of the court, could prove his statement because no evidence of Lombardo's lack of ownership had been entered on the record. The court informed Mr. Oliver that if he could not prove his representation, he would be disbarred and held in contempt. Lombardo contends that this exchange prejudiced him and affected the jury's verdict.

We do not agree. At the next court session, the court gave the jury a curative instruction, stating that the de-

fendant was presumed innocent, was not required to produce evidence, and that the Government carried the burden of proof. The court's instruction served to correct any misunderstanding the jury may have had from the court's prior admonition to Mr. Oliver. Furthermore, the fact in issue, ownership and/or color of Lombardo's car, was not a critical issue. Although the admonition should not have been made in the presence of the jury, these remarks by the court cannot be deemed prejudicial error.

P. Appellant Rockman's Claims[13]

Rockman argues that the district court erred when it ruled on the admissibility of co-conspirator hearsay statements at the close of the Government's case and not at the end of all the evidence. Thus, he contends, statements and acts that occurred after the conspiracy had ended were erroneously admitted.

Rockman's argument alleges that the district court failed to follow the procedures mandated by *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978). He contends that because *Bell* requires the court to rule on the admissibility of co-conspirator hearsay statements at the close of all the evidence, the district court prejudiced his ability to present his defense when it made its ruling at the close of the Government's case. Rockman contends that the court's premature ruling caused it to exclude testimony of Shannon Bybee, a Government witness, who was called by Rockman to testify that Glick had no gaming interests after 1979. Rockman argues that this evidence was crucial because the indictment charged that the illegal objective of the conspiracy was to maintain a hidden interest in the gaming interests of Allen Glick. Because Glick held no

[13] We address Rockman's claims as presented in his substituted supplemental brief. His original brief raised different issues which, although we do not discuss, lack merit. Although this substituted brief raised new issues after the initial briefing, we permitted its filing because of the extraordinary circumstances causing counsel's substitution and in the interest of fairness.

gaming interests after 1979, the district court erred in admitting co-conspirator acts and statements that occurred after 1979.

Initially, we note that it is not per se reversible error for the district court to make *Bell* findings at the close of the Government's case. *United States v. Legato*, 682 F.2d 180, 183 (8th Cir.), *cert. denied*, 459 U.S. 1091 (1982). Rather, we must determine whether Rockman suffered any prejudice from the court's action. *Id.*

Rockman contends that he was prejudiced because he could not establish that the conspiracy ended in 1979 and thus prove subsequent statements inadmissible. Although we are troubled by the district court's exclusion of Mr. Bybee's testimony on Rockman's behalf, we cannot say that the court's action rises to reversible error. In essence, Rockman is alleging prejudice because the evidence varied impermissibly from the indictment. The indictment charged that the conspiracy lasted until 1983. Rockman argues that because the illegal objective was a hidden interest in Glick's gaming interests, the conspiracy ended in 1979 with Glick's sale of his casinos.

As a variance argument, Rockman's challenge is without merit. He had ample and obvious notice that the Government was attempting to prove a conspiracy that endured until 1983. Furthermore, the jury knew of Glick's 1979 sale. The court also instructed the jury that co-conspirator statements made after the end of the conspiracy could be considered only against the person making them. Accordingly, the court did not commit reversible error in this regard.

III. CONCLUSION

For the reasons stated above, we affirm the convictions.

A true copy.

ATTEST:

CLERK U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 86-1441WM

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the
vs.	*	United States District
	*	Court for the Western
Joseph John Aiuppa,	*	District of Missouri.
	*	
Appellant.	*	
	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

December 16, 1987

A true copy.

ATTEST:

/s/ ROBERT D. ST. VRAIN
Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C

INDEPENDENT EVIDENCE

FAVORABLE TO AIUPPA

Lack of Probative Evidence

1) No Aiuppa voice on any intercepted conversations; Vol 8/pp. 135-138; Vol. 13/pg. 153
2) No Aiuppa fingerprints, Vol. 13 pg. 194
3) No Aiuppa handwriting, Vol. 13 pg. 154
4) Aiuppa not in black book Vol. 13/pg. 151
5) Aiuppa not in DeLuna address book; Vol 13
6) Confusion as to whether Aiuppa #22. . . FBI Agent Shelton never heard of Aiuppa referred to as "#22"; Vol 9/pg. 210 while FBI Agent Ouseley could only conclude Aiuppa was #22 by process of elimination, Vol. 13/pg. 152, pp. 166-190*
7) Aiuppa's home never searched Vol 14/pp. 49-51
8) At big meeting in K.C. Hotel where Gov. Ex.

FAVORABLE TO THE GOVERNMENT

Physical surveillance

1) 3/20/78—Aiuppa and T. Spilotro, Palm Springs, CA Vol. 45/pp. 103-111
2) 8/16/78—26th & Princeton, Chicago; with Cerone Cerone, Rosenthal, LaPietra and Torello* Vol. 52/pp. 19-41, 55-78
3) 9/11/78—Trader Vics Restaurant, seen with Cerone and Accardo*, Vol. 51/pg. 121
4) 10/22/78—1452 Barry Street Chicago, w/Cerone, LaPietra (Chiavola's home) Vol. 9/pp. 150-156
5) 10/25/78—Aiuppa seen entering home of Torello in Cicero, IL; Vol. 51/pp. 63, 64
6) 11/16/78—Rocky's Restaurant, Melrose Park, IL; with Cerone & Accardo; Vol. 51/pp. 89-90
7) 3/11/79—1452 Barry Street, Chicago, IL; with Chiavola, Sr.,

INDEPENDENT EVIDENCE

#1440 involved on 3/25/79. . . no Aiuppa reference at all; Vol 15/all; Vol 16/all.

9) Lawyer for pension fund testified during this trial for over 3 days . . . no reference to Aiuppa at all, Vol 21/pp. 191-205;

10) The major witness/victim in this case, Glick, testified for seven days and no mention of Aiuppa at all. . . not as a partner of Glick's nor as a person Glick feared; the Glick testimony is contained in Vol. 26 to 32.

11) All Kansas City FBI Surveillance involving DeLuna and Civella's. . Aiuppa is never seen; Vol. 32 and 33/generally.

12) Potential Stardust purchaser and government witness, Gustafson. . . no mention of Aiuppa at all, Vol. 34/pp. 126, 127;

13) Carl Thomas, former defendant in this case testified as a government witness. . . knew nothing of Aiuppa, Vol. 39/pp. 140. . . and "the Cerone, N. Civella; Vol 9/pp. 157-159

8) 4/9/79—Golden Horn Restaurant, Melrose Park, IL; with Lombardo & A. Dorfman* Vol. 16/pp. 123-125

9) 5/1/79—w/Lombardo & Cerone at Hotel across from O'Hare Airport. Vol. 51/pp. 150-60

10) 11/29/79—K-Mart, Melrose Park, IL; with Cerone & Al Tornabene Vol 51/pp. 98-100

INDEPENDENT EVIDENCE

old man" Carl Thomas knew to be Nick Civella, Vol. 39/pg. 211

14) FBI Agents surveilling Angelo Lonardo during 1979 never saw him in the company of Aiuppa, e.g., Vol. 43/pp. 93-104; Vol. 44/pp. 62, 63 (Lonardo testified as a government witness in this case and testified he met Aiuppa in Chicago in 1979 Vol. of 11/22/85 at Tr. 100, 118.

15) Glick testified that Rosenthal might have had a boss, but that boss was not Aiuppa. . . rather it was Torello, Vol. 32 Pt, 1/pg. 933

---

* In February, 1979 the FBI seized notes or records during the search of the Carl DeLuna home; eventually the government produced an agent who testified that Aiuppa was "#22" within the multiple DeLuna notes

* Messrs. Dorfman and Torello died pre-indictment but were named as conspirators; Accardo is not in the indictment

APPENDIX D

* * * * *

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

From on or before January, 1974, the exact date being unknown to the Grand Jury, to the date of return of this indictment, in the Western District of Missouri, and elsewhere, CARL ANGELO DELUNA, CARL JAMES CIVELLA, PETER JOSEPH TAMBURELLO, CARL WESLEY THOMAS, ANTHONY CHIAVOLA, SR., ANTHONY CHIAVOLA, JR., JOSEPH JOHN AIUPPA, JOHN PHILLIP CERONE, JOSEPH LOMBARDO, ANTHONY JOHN SPILOTRO, ANGELO LAPIETRA, MILTON JOHN ROCKMAN, JOHN JOSEPH BALISTRIERI, JOSEPH PHILLIP BALISTRIERI and FRANK PETER BALISTRIERI, defendants herein, Nick Civella, Allen M. Dorfman, James Vincent Torello and Joseph Vincent Agosto, now deceased, did knowingly and willfully conspire, combine, confederate and agree together with each other and with diverse other persons, both known and unknown to the Grand Jury, to commit the following offense against the United States:

To travel in interstate commerce and to use facilities in interstate commerce with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving the management, operation, conducting, maintaining and carrying on of gambling operations of licensed gaming establishments in Las Vegas, Nevada, that is, gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, and the indirect receipt of moneys played therein, by persons who were not licensed or found suitable for licensing by,

and whose interest in said gaming establishments had been concealed from, agencies of the State of Nevada, in violation of the Nevada Gaming Control Act, including Sections 463.130, 463.160, 463.165, 463.170, 463.200, 463.300, 463.335, 463.339, 463.360, 463.510, 463.520, 463.530, 463.540 and 463.585 of the Nevada Revised Statutes, and regulations of the Nevada Gaming Commission promulgated thereunder including Regulations 3.020, 3.080, 3.090, 3.100, 3.110, 4.030, 4.040, 8.010, 8.030, 8.050, 8.130, 15.510.1, 15.585, 15.1594-6 and 15.1594-7, and to distribute the proceeds of the aforesaid unlawful activity, and to thereafter perform and attempt to perform acts to promote, manage, establish and carry on and to facilitate the promotion, management, establishment and carrying on of said unlawful activity, and to distribute the proceeds of said unlawful activity, in violation of Title 18, United States Code, Section 1952.

At all times pertinent to this indictment the gaming establishments of Allen R. Glick, including the Stardust and Fremont casinos, were operating pursuant to licenses issued by the Nevada Gaming Commission permitting the conduct of gaming operations in accordance with the Nevada Gaming Control Act and its implementing regulations.

Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH E. SPANIOL, JR.
CLERK

Nos. 87-1365, 87-1409, 87-1419, 87-1446 and 87-1543

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH JOHN AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ANGELO LAPIETRA, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN PETER CERONE, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

MILTON JOHN ROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court's instruction that everyone is presumed to know what the law forbids and what it requires to be done constituted harmless error.

2. Whether the Double Jeopardy Clause forbids separate convictions and sentences for the offenses of conspiracy to violate the Travel Act, 18 U.S.C. 1952, and a substantive violation of the Travel Act.

3. Whether this Court's decision in *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), should be retroactively applied.

4. Whether the district court improperly precluded petitioner Rockman from offering evidence bearing on the admissibility of certain co-conspirator statements.

5. Whether a defendant who is indicted as an aider and abettor may be convicted as a principal pursuant to *Pinkerton* v. *United States,* 328 U.S. 640 (1946).

6. Whether the district court correctly instructed the jury on the law of conspiracy.

7. Whether the indictment sufficiently alleged violations of the Travel Act.

8. Whether there was sufficient evidence to support petitioner Cerone's conviction on one of the substantive Travel Act counts.

TABLE OF CONTENTS

	Page
Opinion below	2
Jurisdiction	2
Statement	2
Argument	7
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, 450 U.S. 333 (1981) 8
Armour Packing Co. v. *United States*, 209 U.S. 56 (1908) 18
Blockburger v. *United States*, 284 U.S. 299 (1932) 6, 8, 9, 10
Bourjaily v. *United States*, No. 85-6725 (June 23, 1987) .. 6, 11, 12
Callanan v. *United States*, 364 U.S. 587 (1961) 8
Hamling v. *United States*, 418 U.S. 87 (1974) 18
Pandelli v. *United States*, 635 F.2d 533 (6th Cir. 1980) ... 10
Pinkerton v. *United States*, 328 U.S. 640 (1946) 6, 10, 11, 14, 15, 16
Rose v. *Clark*, 478 U.S. 570 (1986) 7, 8
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985) 13
Turf Center, Inc. v. *United States*, 325 F.2d 793 (9th Cir. 1963) 19
United States v. *Alsobrook*, 620 F.2d 139 (6th Cir.), cert. denied, 449 U.S. 843 (1980) 16
United States v. *Austin*, 529 F.2d 559 (6th Cir. 1976) 10
United States v. *Bailey*, 444 U.S. 394 (1980) 18
United States v. *Bell*, 457 F.2d 1231 (5th Cir. 1972) 15
United States v. *Blackmon*, No. 86-1427 (2d Cir. Feb. 9, 1988) 12
United States v. *Bright*, 630 F.2d 804 (5th Cir. 1980) 16
United States v. *Brown*, 770 F.2d 768 (9th Cir.), cert. denied, 474 U.S. 1036 (1985) 18-19
United States v. *Bryan*, 483 F.2d 88 (3d Cir. 1973) 15
United States v. *Callanan*, 810 F.2d 544 (6th Cir. 1987), cert. denied, No. 86-6735 (Oct. 5, 1987) 10

Cases – Continued: Page

United States v. *Carll*, 105 U.S. 611 (1882) 18
United States v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985) 15
United States v. *Debrow*, 346 U.S. 374 (1953) 18
United States v. *Feola*, 420 U.S. 671 (1975) 8
United States v. *Finazzo*, 704 F.2d 300 (6th Cir.), cert. denied, 463 U.S. 1210 (1983) 10
United States v. *Garner*, 837 F.2d 1404 (7th Cir. 1987) ... 12
United States v. *Gordon*, 812 F.2d 965 (5th Cir. 1987), certs. denied, No. 86-6801 (June 1, 1987) and No. 86-6870 (June 22, 1987) 15
United States v. *Hernandez*, 829 F.2d 988 (10th Cir. 1987) 12
United States v. *Kegler*, 724 F.2d 190 (D.C. Cir. 1983) ... 15
United States v. *Knigge*, 832 F.2d 1100 (9th Cir. 1987) ... 12
United States v. *Larkin*, 605 F.2d 1360 (1979), modified, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980) 11
United States v. *McCullah*, 745 F.2d 350 (1984) 10
United States v. *McGowan*, 423 F.2d 413 (4th Cir. 1970) . 10
United States v. *Meester*, 762 F.2d 867 (11th Cir.), cert. denied, 474 U.S. 1024 (1985) 15
United States v. *Miller*, 552 F. Supp. 827 (N.D. Ill. 1982), aff'd mem., 729 F.2d 1464 (7th Cir. 1984) 16
United States v. *Nickerson*, 606 F.2d 156 (6th Cir.), cert. denied, 444 U.S. 994 (1979) 10
United States v. *Polizzi*, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975) 10
United States v. *Redwine*, 715 F.2d 315 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984) 15
United States v. *Rodriguez*, 585 F.2d 1234 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980) 9
United States v. *Roselli*, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971) 15, 16
United States v. *Scandifia*, 390 F.2d 244 (2d Cir. 1968), vacated, 394 U.S. 310 (1969) 15
United States v. *Stanley*, 765 F.2d 1224 (5th Cir. 1985) ... 19
United States v. *Wylie*, 625 F.2d 1371 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981) 11
Whalen v. *United States*, 445 U.S. 684 (1980) 9

Constitution, statutes and rules: Page

U.S. Const.:
Amend. V (Double Jeopardy Clause) 6, 7, 8, 9
Amend. VI 7
Travel Act, 18 U.S.C. 1952 3
18 U.S.C. 2 15
18 U.S.C. 371 2-3
21 U.S.C. 846 8
21 U.S.C. 963 8
Fed. R. Crim. P.:
Rule 7(c)(1) 18
Rule 35 3
Fed. R. Evid.:
Rule 104(a) 13
Rule 801(d)(2)(E) 7, 11, 12, 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1365

JOSEPH JOHN AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1409

ANGELO LAPIETRA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1419

JOHN PETER CERONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1446

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1543

MILTON JOHN ROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (87-1365 Pet. App. A1-A25) is reported at 830 F.2d 938.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1987. The petition for rehearing and rehearing en banc in No. 87-1543 was denied on December 15, 1987 (87-1543 Pet. App. C1). On February 12, 1988, Justice Blackmun granted an extension of time to and including March 14, 1988, within which to file a petition for a writ of certiorari, and the petition in No. 87-1543 was filed on that date. The petition for rehearing and rehearing en banc in No. 87-1365 was denied on December 16, 1987 (87-1365 Pet. App. B1), and the petition for a writ of certiorari in that case was filed on February 12, 1988. Petitions for rehearing and rehearing en banc in Nos. 87-1409, 87-1419, and 87-1446 were denied on December 23, 1987 (87-1409 Pet. App. B1; 87-1419 Pet. App. B1), and petitions for a writ of certiorari in Nos. 87-1409 and 87-1419 were filed on February 22, 1988 (a Monday). The petition for a writ of certiorari in No. 87-1446 was filed on February 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioners were each convicted on one count of conspiring to travel in interstate commerce and to use interstate commerce facilities with intent to promote an unlawful activity, in violation of 18

---

[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 87-1365.

U.S.C. 371; and on seven counts of traveling in interstate commerce or using interstate commerce facilities to promote unlawful activities, in violation of 18 U.S.C. 1952. Petitioners Aiuppa and Cerone were each sentenced to consecutive terms of imprisonment for four years on the conspiracy count and three and one-half years on each of the substantive Travel Act counts, for a total of 28 and one-half years' imprisonment. Petitioners Lombardo and LaPietra were each sentenced to consecutive terms of imprisonment for two years on each count, for a total of 16 years' imprisonment. Petitioner Rockman was sentenced to consecutive terms of imprisonment for three years on each count, for a total of 24 years' imprisonment. The court imposed cumulative fines of $10,000 on each count as to each petitioner. On February 2, 1988, the district court, pursuant to Fed. R. Crim. P. 35, modified the sentences of Lombardo, Rockman, and LaPietra by requiring their sentences on the conspiracy count (Count 1) to run concurrently with their sentences on the first substantive count (Count 2), but leaving unchanged the consecutive sentences on Counts 2 through 8. The court modified Cerone's sentence by requiring his sentence on Count 1 to run concurrently with his sentences on Counts 2 and 3, but leaving unchanged the consecutive sentences on Counts 2 through 8. The court delayed ruling on Aiuppa's Rule 35 motion. 87-1543 Pet. App. B1-B6. The court of appeals affirmed (Pet. App. A1-A25).

1. The evidence at trial is summarized in the opinion of the court of appeals. It shows that petitioners and others sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and the Fremont casinos, in violation of Nevada gaming laws. The casinos were owned by the Argent Corporation which, in turn, was owned by Allen R. Glick. Glick's

purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators achieved control of the casinos by helping Glick obtain the financing to purchase them and by placing two of their confederates, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control over the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund, and Roy Williams, a Teamsters official. Pet. App. A2-A3.

The conspirators exercised control over Argent and the Teamsters Union by virtue of their membership in organized crime groups in various Midwestern cities. Petitioner Aiuppa was the boss of the Chicago organized crime group, petitioner Cerone was its underboss, and petitioners LaPietra and Lombardo were members of that group. Petitioner Rockman was an associate of the Cleveland organized crime group; co-conspirator Nick Civella headed the Kansas City organized crime group; and co-conspirator Frank Balistrieri was the boss of the Milwaukee organized crime group. Pet. App. A3.

In early 1974, Balistrieri agreed to help Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Civella and Rockman, who each controlled a trustee of the pension fund. After Glick obtained the loan and purchased the casinos, Balistrieri and others required Glick to appoint Frank Rosenthal to a management position at Argent. In that capacity, Rosenthal supervised the skimming of gambling proceeds from the casinos. Initially, the Kansas City, Milwaukee, and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose among the groups, and the Chicago group, including Aiuppa, Cerone, Lombardo,

and LaPietra, began sharing in the skimming proceeds. Pet. App. A3-A4.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. During the operation, LaPietra became DeLuna's contact with the Chicago group. Rockman was DeLuna's contact in the Cleveland group and also served as an intermediary in DeLuna's dealings with the Chicago group. Pet. App. A4.

The skimmed money was ordinarily delivered from Las Vegas to Chicago. LaPietra would deliver the money to a member of the Chicago group who, in turn, would deliver shares to DeLuna for the Kansas City group and to Rockman for the Cleveland group. Pet. App. A4.

During 1976-1979, the conspirators had several conversations in which they discussed replacing Rosenthal, who had become embroiled in widely publicized disputes with the Nevada licensing authorities. During the same period, Glick expressed reluctance to accept the conspirators' control of Argent through Rosenthal. Civella and DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal. Glick yielded to their demands. Sometime later, DeLuna told Glick that his "partners" were dissatisfied, and DeLuna threatened to kill Glick unless Glick sold Argent. In December 1979, Glick sold Argent to another company. Pet. App. A4-A5.

In October 1977, independent investment managers took control of the pension fund assets, hindering the conspirators' ability to control the fund. The conspirators, principally Lombardo and Allen Dorfman, held numerous strategy discussions concerning efforts to replace the independent managers with persons controlled by the conspirators. Between 1979 and 1981, the conspirators, in-

cluding Aiuppa, Cerone, Lombardo, and Rockman, supported Roy Williams to succeed Frank Fitzsimmons as Teamsters president and later supported Jackie Presser to succeed Williams, in an effort to secure influence within the Teamsters' Union. Pet. App. A5.

2. The court of appeals affirmed (Pet. App. A1-A25). The court first held (*id.* at A8) that although petitioners were indicted as aiders and abettors in the Travel Act counts, there was no error in submitting those charges to the jury on a theory of vicarious liability under *Pinkerton* v. *United States,* 328 U.S. 640 (1946). Next, applying the analysis in *Blockburger* v. *United States,* 284 U.S. 299 (1932), the court concluded (Pet. App. A9-A13) that the Double Jeopardy Clause does not forbid separate convictions on the conspiracy and substantive Travel Act counts—even where, as here, liability on the substantive offenses is predicated on *Pinkerton.* The court rejected (Pet. App. A13-A15) on harmless error grounds petitioners' challenge to a portion of the jury charge that stated that "the presumption is that every person knows what the law forbids, and what the law requires to be done" (*id.* at A13). The court next found (*id.* at A17-A18) sufficient evidence to support the admission of the co-conspirator statements in the case. In reaching that conclusion, the court applied this Court's recent decision in *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), but also found "direct evidence of the conspiracy and [petitioners'] participation in it" (Pet. App. A18 n.10). The court then upheld (*id.* at A20-A21) the instructions on conspiracy, rejecting as meritless the claim that the trial court had permitted the jury to convict on the conspiracy count if it found evidence that petitioners had aided and abetted a substantive offense. The court next determined (*id.* at A21) that the evidence, although circumstantial,

was sufficient to show that petitioner Cerone had traveled from Chicago, Illinois, to Kansas City, Missouri, for illegal purposes, as alleged in Count 7 of the indictment. The court also concluded (*id.* at A23) that the substantive Travel Act counts in the indictment were sufficient, noting that the indictment contained lengthy allegations of fact and provided ample notice of the acts with which petitioners were charged. Finally, the court held (Pet. App. A24-A25) that petitioner Rockman was not prejudiced by the trial court's exclusion of certain defense testimony regarding Glick's sale of his business interests in 1979—testimony that Rockman had offered purportedly to show that post-1979 co-conspirator statements were not made in the course of the conspiracy, as is required by Fed. R. Evid. 801(d)(2)(E).

ARGUMENT

1. Petitioners first argue (87-1365 Pet. 11-18) that the trial court violated the Fifth and Sixth Amendments when it gave the following instruction (Pet. App. A13):

> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

The court of appeals did not approve of that instruction. Rather, it assumed (Pet. App. A15) that the instruction was erroneous. Applying this Court's decision in *Rose* v. *Clark*, 478 U.S. 570 (1986), however, the court of appeals held that on the present record the error was harmless.

Petitioners acknowledge (87-1365 Pet. 17) that *Rose* v. *Clark, supra,* applies, and they do not take issue with the court of appeals' analysis of the record. They simply con-

tend that it is "unclear" (87-1365 Pet. 18) whether the court of appeals found the challenged instruction to be harmless beyond a reasonable doubt. That claim is meritless. Although the court of appeals did not articulate the harmless error standard in so many words, it expressly adopted the analysis employed by this Court in *Rose* v. *Clark, supra.* There is no reason to believe that it did so erroneously.

2. Next, petitioners contend (87-1409 Pet. 8-19; 87-1419 Pet. 18-22) that the Double Jeopardy Clause prohibits separate convictions and sentences for conspiracy and substantive violations of the Travel Act. That contention is mistaken.

This Court has long held that separate convictions and punishments are permissible for ordinary substantive offenses and conspiracies to commit those offenses. See *United States* v. *Feola,* 420 U.S. 671, 693 (1975); *Callanan* v. *United States,* 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States,* 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit the imposition of separate judgments and cumulative punishment. In *Albernaz* v. *United States,* 450 U.S. 333 (1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld

cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez*, 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).[2]

Under that standard, a conspiracy to violate the Travel Act and a substantive violation of the Act are separate offenses and may be separately prosecuted and punished. A conspiracy requires proof of an agreement, while a substantive offense does not; a substantive offense requires proof that the offense was consummated, while a conspiracy does not. The courts of appeals have uniformly

---

[2] Citing this Court's decision in *Whalen* v. *United States*, 445 U.S. 684 (1980), petitioners contend (87-1409 Pet. 12-13; 87-1419 Pet. 19-21) that the analysis under *Blockburger* should focus not on the elements of the offense but on the evidence introduced at trial. The *Whalen* case does not alter the traditional test. That case involved a prosecution for the offenses of rape and felony murder. Under the governing statute, felony murder could be committed in the course of any one of six specified felonies, including rape. The defendant was separately punished for both the rape and the felony murder committed in the course of the rape. The government contended that because felony murder could be proved by establishing a predicate other than rape, it followed that under *Blockburger* rape and felony murder could be separately prosecuted and punished. Applying the *Blockburger* test, this Court disagreed. The Court reasoned that the felony murder statute—which listed the six predicate felonies in the alternative—was functionally indistinguishable from a statute that separately proscribed six different species of felony murder under six statutory provisions. The Court therefore regarded each category of felony murder as, in substance, a separate offense, each with its own lesser-included predicate. Under the Court's analysis, therefore, all the elements of rape were included in the offense of felony murder by rape, and under *Blockburger* cumulative punishments would violate the Double Jeopardy Clause. In reaching that conclusion, however, the Court in *Whalen* was careful to point out that it was "not in this case apply[ing] the *Blockburger* rule to the facts alleged in a particular indictment" (445 U.S. at 694 n.8).

reached the same conclusion. See, *e.g.*, *United States* v. *Nickerson*, 606 F.2d 156, 159 (6th Cir.), cert. denied, 444 U.S. 994 (1979); *United States* v. *Polizzi*, 500 F.2d 856, 897 & n.3 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *United States* v. *McGowan*, 423 F.2d 413, 415-417 (4th Cir. 1970).[3]

The analysis is no different even where, as here, petitioners' convictions on the substantive counts may have rested, under *Pinkerton*, on their participation in the conspiracy. To be sure, under *Pinkerton* each co-conspirator becomes liable for the substantive violations committed by his confederates in furtherance of the conspiracy. In that sense, the conspiratorial agreement is a necessary component of substantive liability under the *Pinkerton* theory. But conspiracy does not, for that reason, become a lesser-included offense of the substantive violation: the latter still requires a completed substantive offense, while the former requires the commission of an overt act that may have nothing to do with the substantive act that gives rise to *Pinkerton* liability. Under *Blockburger*, therefore, con-

[3] Contrary to petitioners' contention (87-1409 Pet. 13-14; 87-1419 Pet. 19-21), the court of appeals' decision does not conflict with any decision of the Sixth Circuit. Indeed, the Sixth Circuit's decision in *Nickerson* is in accord with the decision reached by the court below. To be sure, the Sixth Circuit, in cases such as *Pandelli* v. *United States*, 635 F.2d 533 (1980), and *United States* v. *Austin*, 529 F.2d 559 (1976), has focused upon the actual evidence submitted at trial instead of the elements of the offenses. In a more recent case, however, the Sixth Circuit recognized that "[t]he *Austin* approach has not fared well in the other circuits" (*United States* v. *McCullah*, 745 F.2d 350, 355 n.6 (1984)), and it emphasized that under *Blockburger* separate prosecutions are permissible "when each offense requires proof of a fact that the other does not" (745 F.2d at 355). Moreover, in *United States* v. *Callanan*, 810 F.2d 544, 545-548 (1987), cert. denied, No. 86-6735 (Oct. 5, 1987), the Sixth Circuit reiterated that the *Blockburger* test focuses only on the statutory elements of the charged offenses. See also *United States* v. *Finazzo*, 704 F.2d 300, 305 (6th Cir.), cert. denied, 463 U.S. 1210 (1983).

spiracy and *Pinkerton* substantive liability are separate offenses and may be separately prosecuted and punished. Indeed, in *Pinkerton* itself, this Court upheld separate convictions and punishments for conspiracy and substantive offenses, even though liability on the substantive offenses was predicated on the doctrine of vicarious liability announced in *Pinkerton*. See also *United States* v. *Wylie*, 625 F.2d 1371, 1380-1382 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981).[4]

3. Petitioners claim (87-1409 Pet. 20-24) that this Court's decision in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), should not be retroactively applied. They assert that the court of appeals therefore erred when it relied on *Bourjaily* in finding sufficient evidence to support the admission of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). That contention has no merit.

In the *Bourjaily* case, this Court held that in determining whether a co-conspirator's statement may be admitted pursuant to Rule 801(d)(2)(E), a trial court may consider the statement itself, as well as other "independent" evidence, in assessing whether there was a conspiracy and whether the defendant and the hearsay declarant were members of that conspiracy. The courts of appeals have uniformly followed *Bourjaily* in resolving Rule

---

[4] The Fifth Circuit's decision in *United States* v. *Larkin*, 605 F.2d 1360 (1979), modified, 611 F.2d 585, cert. denied, 446 U.S. 939 (1980), is not in conflict. There, the court held that the government could retry a defendant for conspiracy, following a trial in which the jury had been deadlocked on the conspiracy count but had acquitted the defendant on a series of substantive counts in which liability was based on *Pinkerton*. Although the court suggested in dicta (605 F.2d at 1367) that conspiracy may be a lesser-included offense of a substantive offense based on *Pinkerton*, the court did not resolve the issue due to "the procedural posture of th[e] case."

801(d)(2)(E) issues that have arisen since the *Bourjaily* case was decided. See, *e.g.*, *United States* v. *Blackmon*, No. 86-1427 (2d Cir. Feb. 9, 1988), slip op. 6435; *United States* v. *Garner*, 837 F.2d 1404, 1415-1416 (7th Cir. 1987); *United States* v. *Knigge*, 832 F.2d 1100, 1103 (9th Cir. 1987); *United States* v. *Hernandez*, 829 F.2d 988, 993-995 (10th Cir. 1987). Petitioners offer no reason to adopt a different rule.

Moreover, there is no justification for refusing to apply the principles of *Bourjaily* in this case. First, the *Bourjaily* Court did not purport to be creating a new rule, contrary to one on which the defendants had relied. The *Bourjaily* Court simply construed a rule of evidence that has been in effect since 1975. And a rule of evidence of that sort is unlike a substantive rule of criminal liability on which individuals might rely in shaping their conduct. Petitioners do not contend—nor could they—that they engaged in the conduct at issue in this case in reliance on previous circuit law limiting the admissibility of co-conspirator declarations against them.

It would be pointless not to apply *Bourjaily* to this case. If this Court were to hold that the principles of *Bourjaily* should not have been applied on appeal, and if the Court were to reverse on that ground, that would normally entitle petitioners only to a new trial. At the new trial the district court would be obligated to apply the standard announced in *Bourjaily*. There is no reason to set aside a court of appeals' decision where, at any new trial, the legal principle adopted by the court of appeals would necessarily be applied by the trial court as well.

In any event, the present case is an inappropriate vehicle for resolving the issue of the "retroactive" application of *Bourjaily*. The district court (see 87-1409 Pet. 6), affirmed by the court of appeals (87-1365 Pet. App. A18 n.10),

found that there was sufficient independent evidence to justify submitting the co-conspirator statements to the jury. Petitioners' fact-bound challenge to that finding does not warrant further review. See *Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 317-318 & n.5 (1985).

4. Petitioner Rockman contends (87-1543 Pet. 12-18) that the trial court improperly denied him the opportunity to introduce certain evidence that was intended to show that the conspiracy charged in the indictment ended in 1979 and thus that co-conspirator statements made after 1979 should not have been admitted under Fed. R. Evid. 801(d)(2)(E). The court of appeals acknowledged (Pet. App. A25) that it was "troubled" by the exclusion of that evidence, but it held that on the present record the exclusion did not constitute reversible error. That decision is clearly correct.[5]

During the defense case, Rockman attempted to show that the conspiracy charged in the indictment ended on December 26, 1979, when Glick sold his interest in the casinos. At trial, as here (87-1543 Pet. 6-11), Rockman contended that "[t]he object of the conspiracy was inextricably tied to the * * * 'gaming interests of Allen R. Glick' " (*id.* at 7). He asserted that when Glick lost his interest in the casinos, the conspiracy necessarily came to an end. In support of that theory, Rockman called Shannon Bybee as an expert on Nevada gaming laws. Rockman hoped to establish through Bybee's testimony that although Glick held a mortgage on the casinos after he

---

[5] The court of appeals did not dispute petitioner's right to offer evidence that the conspiracy ended in 1979. Thus, this case does not present the question whether a defendant may offer evidence bearing on the trial court's preliminary determination, pursuant to Fed. R. Evid. 104(a), whether the factual predicates for the admission of a co-conspirator's statement have been established.

sold them, his stake was insufficient under Nevada law to constitute a financial interest in the casinos. The trial court permitted Rockman to ask Bybee various hypothetical questions concerning the circumstances under which Nevada gaming authorities would require that a mortgage holder obtain a gaming license. The court refused, however, to permit Rockman to ask Bybee three hypothetical questions in that line, holding that the proposed questions omitted material facts and were therefore misleading in the form propounded by Rockman. The court advised Rockman that he could ask those questions if he included the omitted material facts. Rockman failed to do so. Gov't C.A. Supp. Br. 11.

The trial court acted well within its discretion in refusing to permit Rockman to put those improper questions to the witness. In any event, as the court of appeals concluded (Pet. App. A25), any error in excluding Bybee's proposed testimony was entirely harmless. A fair reading of the indictment shows that the object of the conspiracy was to secure and maintain a financial interest in Glick's casinos—an object that did not abate when Glick gave up his personal stake in the operation. See C.A. App. 14. Thus, even if Rockman had succeeded in establishing that Glick had ended his financial interest in the casinos in 1979, the trial court was nevertheless correct in concluding that the conspiracy continued for several years thereafter and that co-conspirator statements made after 1979 were admissible under Fed. R. Evid. 801(d)(2)(E).

5. Petitioners contend (87-1419 Pet. 10-16; 87-1446 Pet. 6-15) that because they were named in the substantive Travel Act counts as aiders and abettors (except for Count 7, in which petitioner Cerone was named as a principal), the trial court erred when it submitted those counts to the jury on the theory that petitioners were liable as principals under *Pinkerton v. United States*, 328 U.S. 640 (1946).

In essence, petitioners claim that there was a fatal variance between the charges in the indictment and the theory on which the case was submitted to the jury. That claim is meritless.

The courts routinely hold that a defendant may be indicted as a principal but convicted on evidence showing that he aided and abetted the substantive offense.[6] See, *e.g., United States* v. *Gordon,* 812 F.2d 965, 969 (5th Cir. 1987), certs. denied, No. 86-6801 (June 1, 1987) and No. 86-6870 (June 22, 1987); *United States* v. *Cook,* 745 F.2d 1311, 1315 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Kegler,* 724 F.2d 190, 201 & n.15 (D.C. Cir. 1983) (citing cases). The converse is also true: a defendant may be indicted as an aider and abettor but convicted on evidence showing him to be a principal. See, *e.g., United States* v. *Bryan,* 483 F.2d 88, 94-97 (3d Cir. 1973) (en banc); *United States* v. *Bell,* 457 F.2d 1231, 1235 (5th Cir. 1972); *United States* v. *Scandifia,* 390 F.2d 244, 250 n.6 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969). Consistent with that general principle, the courts have regularly held that defendants may be convicted as principals under *Pinkerton,* even though they were indicted as aiders and abettors. See, *e.g., United States* v. *Meester,* 762 F.2d 867, 878 (11th Cir.), cert. denied, 474 U.S. 1024 (1985); *United States* v. *Redwine,* 715 F.2d 315, 322 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); *United States* v. *Roselli,* 432 F.2d 879, 894-895 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). In the *Meester* case, for example, the court rejected the same claim pressed by petitioners, noting (762 F.2d at 878) that "[t]his is essentially an argument that the *Pinkerton* instruction constituted a variance from the charges con-

---

[6] Indeed, the aiding and abetting statute, 18 U.S.C. 2, specifically provide that aiders and abettors are punishable as principals.

tained in the indictment. To benefit from any such variance, the appellants would have to demonstrate prejudice." Accord *Roselli,* 432 F.2d at 895.

In the present case, petitioners do not suggest how they were prejudiced, if at all, by the fact that the substantive Travel Act counts were submitted to the jury on a *Pinkerton* theory of liability. As in the *Roselli* case (see 432 F.2d at 895), petitioners were indicted on conspiracy charges, and thus had notice of, and an opportunity to contest, the essential element of *Pinkerton* liability. Moreover, the only additional factor under *Pinkerton*—whether the substantive acts were in furtherance of the conspiracy—"was not subject to argument in the context of this case" (*Roselli*, 432 F.2d at 895). In the absence of any showing of prejudice, petitioners' variance contention is insufficient.[7]

6. Petitioner Lombardo claims (87-1446 Pet. 15-16) that the instructions on the law of conspiracy were erroneous, in that the trial court "fail[ed] to limit the aiding and abetting instruction to the substantive counts" (*id.* at 15). The court of appeals examined the instructions and rejected petitioner's claim (Pet. App. A20-A21). It noted that the trial court had "correctly instructed the jury on the elements of conspiracy" (*id.* at A20) and that the aiding and abetting instructions "refer[red] to the substantive

---

[7] Petitioners' contention (87-1419 Pet. 11-13) that the court of appeals' decision conflicts with *United States* v. *Bright,* 630 F.2d 804 (5th Cir. 1980); *United States* v. *Alsobrook,* 620 F.2d 139 (6th Cir.), cert. denied, 449 U.S. 843 (1980); and *United States* v. *Miller,* 552 F. Supp. 827 (N.D. Ill. 1982), aff'd mem., 729 F.2d 1464 (7th Cir. 1984) (Table), is without merit. None of those cases involved the question whether a defendant who is indicted as an aider and abettor may nevertheless be convicted on evidence showing that he was a principal under *Pinkerton*.

Travel Act offenses, not conspiracy" (*id.* at A21). Lombardo offers no reason to reject that conclusion.

7. Petitioners contend (87-1419 Pet. 6-10; 87-1446 Pet. 17-20) that the Travel Act counts in the indictment did not state an offense. That fact-bound challenge merits no review.

Count 7 of the indictment (C.A. App. 37-38), which is representative of each of the seven substantive Travel Act counts, alleged, in pertinent part, that on or about January 11, 1979, petitioner Cerone traveled in interstate commerce from Chicago, Illinois, to Kansas City, Missouri, for the purpose of meeting with Carl Civella, Nick Civella, and Carl DeLuna

> to discuss matters pertinent to the sale of or transfer of ownership of the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving the management, operation, conducting and carrying on of gambling operations of licensed gaming establishments in Las Vegas, Nevada, that is, the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, and the indirect receipt of moneys played therein, by persons who were not licensed by, and whose interest in said gaming establishments had been concealed from the Nevada Gaming Control Act * * * and regulations of the Nevada Gaming Commission * * * and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of

> said unlawful activity and [petitioners and others] did aid, abet, counsel, command, induce and procure the commission of said offense.

Under Fed. R. Crim. P. 7(c)(1) an indictment need only be "a plain, concise and definite written statement of the essential facts constituting the offense charged." The rule was "designed to eliminate technicalities" and is "to be construed to secure simplicity in procedure." *United States* v. *Debrow,* 346 U.S. 374, 376 (1953). An indictment is ordinarily sufficient if it contains the elements of the offense, fairly informs the defendant of the charge, and enables him to avoid a future prosecution for the same offense on double jeopardy grounds. *United States* v. *Bailey,* 444 U.S. 394, 414 (1980); *Hamling* v. *United States,* 418 U.S. 87, 117-118 (1974). To meet that standard, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished' " (*Hamling,* 418 U.S. at 117, quoting *United States* v. *Carll,* 105 U.S. 611, 612 (1882)).[8]

An indictment under the Travel Act requires an allegation of " '(1) [travel in] interstate commerce or use of an interstate facility, (2) with intent to promote an unlawful activity, and (3) a subsequent overt act in furtherance of that unlawful activity.' " *United States* v. *Brown,* 770 F.2d

---

[8] As this Court has put it, " 'the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.' " *Armour Packing Co.* v. *United States,* 209 U.S. 56, 84 (1908) (citation omitted).

768, 772 (9th Cir.) (citation omitted), cert. denied, 474 U.S. 1036 (1985). In this case, each substantive Travel Act count tracked the statutory language and stated each of the prescribed elements. "Because the Travel Act fully and unambiguously sets out the essential elements of the offense, indictments drafted substantially in its language are sufficient." *United States* v. *Stanley,* 765 F.2d 1224, 1239-1240 (5th Cir. 1985). Accord *Turf Center, Inc.* v. *United States,* 325 F.2d 793, 796, 797 (9th Cir. 1963).

8. Petitioner Cerone contends (87-1419 Pet. 16-18) that the evidence was insufficient to support his Travel Act conviction on Count 7. Count 7 alleged that on or about January 11, 1979, Cerone traveled from Chicago, Illinois, to Kansas City, Missouri, to meet with DeLuna, Carl Civella, and Nick Civella, to discuss the sale of the Stardust and Fremont casinos (C.A. App. 37-38). The court of appeals conducted a meticulous review of the record and concluded that the evidence on that count was sufficient (Pet. App. A21). As the court explained, the evidence showed that Cerone lived in Chicago. On January 11, 1979, FBI agents observed Carl DeLuna pick up two men at the Kansas City airport and take them to Anthony Civella's residence. DeLuna later drove Cerone back to the airport in the same car that was observed earlier. Cerone was then seen leaving Kansas City and arriving at the Chicago airport. In addition, notes taken by DeLuna and admitted at trial recorded that DeLuna met with Cerone and Civella on January 11, 1979, to discuss negotiations to buy Argent. That evidence, the court of appeals concluded (*ibid.*), "would enable the jury to infer that Cerone traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation."

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
THOMAS E. BOOTH
Attorney

APRIL 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988 – 202 037/60400

Supreme Court, U.S.
FILED
APR 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH JOHN AIUPPA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

ALLAN A. ACKERMAN *
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

SANTO J. VOLPE
105 West Madison Street
Chicago, Illinois 60602
(312) 641-5411

Attorneys for Petitioner
Joseph John Aiuppa

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
CONCLUSION	5

TABLE OF AUTHORITIES

Berrier v. Egeler, 583 F.2d 515 (CA 6, 1978)	4
City of Los Angeles v. Heller, ___ U.S. ___, 106 S.Ct. 1571 (1986)	2
Duncan v. Louisiana, 391 U.S. 145 (1968)	4
Francis v. Franklin, 471 U.S. 307 (1985)	4
Greer v. Miller, 481 U.S. ___, 107 S.Ct. 3102 (1987)	2
In Re Winship, 397 U.S. 358 (1970)	4
Patterson v. New York, 432 U.S. 197 (1977)	4
Richardson v. Marsh, 481 U.S. ___, 107 S.Ct. 1702 (1987)	2
Rose v. Clark, 478 U.S. 570 (1986)	2, 3
Sandstrom v. Montana, 442 U.S. 510 (1979)	4
United States v. Davis, 583 F.2d 190 (CA 5, 1978)	3
United States v. Golitschek, 808 F.2d 195 (CA 2, 1986)	2, 3
United States v. Mentz, 840 F.2d 315 (CA 6, 1988)	3, 4
Yates v. Aiken, ___ U.S. ___, 108 S.Ct. 534 (1988)	2

No. 87-1365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH JOHN AIUPPA,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY BRIEF

I.

INTRODUCTION

Few cases present a clearer question. The administration of criminal justice in the federal courts will be substantially advanced by granting review in this case. The Courts of Appeals for the Second and Fifth Circuits have found the same jury instruction to be prejudicial error.

The Eighth Circuit is troubled by the instruction and assumes some degree of error . . . but finds the application of *Rose v. Clark*, 478 U.S. 570 (1986) to be capable of salvaging the tainted instruction.

The split-in-Circuits as regarding "presumption" instructions merits plenary consideration by the Court particularly in light of the Court's recent statement that such an instruction is violative of the Due Process Clause, *Yates v. Aiken*, ____ U.S. ____, 108 S.Ct. 534, 536 (1988).

1. In *United States v. Golitschek*, 808 F.2d 195 (CA 2, 1986) the Court reversed a series of federal convictions while reviewing a series of jury instructions which included [that] *every person is presumed to know that [which] the law forbids*, (808 F.2d 202).

While reversing the *Golitschek* convictions the Court noted:

> "Whether or not this is so, there is no doubt that he, *like a United States citizen charged with similar offenses occurring wholly in this country, may not be presumed to know the law that establishes the legal requirement that must be known in order to commit the offenses charged*," (808 F.2d at 203; emphasis supplied).[1]

---

[1] In *City of Los Angeles v. Heller*, ____ U.S. ____, 106 S.Ct. 1571 (1986) (*per curiam*) the Court noted that the theory under which jury instructions are given by the trial courts and reviewed on appeal is that juries *act in accordance with the instructions given them* (106 S.Ct. at 1573) (Justices Brennan, Marshall and Stevens, dissenting).

Thus, the Court has consistently found, in recent years, that appeals are to be decided on the proposition that juries act in accordance with the instructions given . . . in accord, *Richardson v. Marsh*, 481 U.S. ____, 107 S.Ct. 1702, 1707 (1987); *Greer v. Miller*, 481 U.S. ____, ____, n. 8, 107 S.Ct. 3102, 3109, n. 8 (1987) (Justices Brennan, Marshall and Blackmun, dissenting).

2. The government declines to defend the offending instruction at bar. The government makes no answer whatsoever to the Aiuppa argument presented from pp. 11-16 of his petition.

3. The petitioner has submitted within his petition the proposition that the presumption instruction at bar was constitutionally flawed. Such an instruction is violative of both the Fifth and Sixth Amendments. The instruction itself was [and is] violative to the point where a new trial MUST BE GRANTED.[2]

The petitioner thus submits, that the government, *sub silentio*, agrees that the flawed jury instruction, under the circumstances of this case, is constitutionally defective and a new trial is mandated. Surely if the government could argue to the contrary they would have addressed the proposition as set out in our moving petition at pp. 11-16.

4. The government fails to correctly analyze *Rose v. Clark*, 478 U.S. 570 (1986) as it relates to this case.

In *United States v. Mentz*, 840 F.2d 315 (CA 6, 1988), a divided Court granted a new trial in connection with a federal bank robbery prosecution. Over objection, the trial judge told the jury that certain banks were insured by the FDIC (*Id.* at 318). While reversing the majority reviewed the presumption cases as well as the decisions involving the simplistic proposition that each essential element of the offense had to be . . . found by the jury . . .

---

[2] We find it both discomforting and disquieting that the government declines to address recent Circuit cases granting new trials where instructions strikingly similar were found to be prejudicial error; cf., *United States v. Golitschek*, 808 F.2d 195, 202, 203 (CA 2, 1986); *United States v. Davis*, 583 F.2d 190, 193 (CA 5, 1978).

to have been the subject of proof beyond a reasonable doubt.[3]

The Court in *Mentz* interpreted *Rose v. Clark*, as follows:

> "*Rose v. Clark* stands for the proposition that 'when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless.' *Hoover v. Garfield Heights Municipal Court*, 802 F.2d 168, 177 (6th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 1610, 94 L.Ed.2d 796 (1987)," (840 F.2d at 324; footnote omitted).

5. The government's observations as relating to this constitutional argument where the petitioner painfully points out that the Second, Fifth and Sixth Circuits took the same instruction and vacated convictions because the instructions were overwhelmingly constitutionally flawed . . . is non-existent. The government does not address these decisions or the constitutional arguments.[4]

---

[3] E.g., *In Re Winship*, 397 U.S. 358, 364 (1970); *Francis v. Franklin*, 471 U.S. 307, 309 (1985); and *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979).

The Court noted the Sixth Amendment implications per *Duncan v. Louisiana*, 391 U.S. 145 (1968) and that this was a matter of "federal due process," *Patterson v. New York*, 432 U.S. 197, 210 (1977), cf., *Berrier v. Egeler*, 583 F.2d 515, 521 (CA 6, 1978).

[4] The government, *seriatim*, suggests that the petitioner "acknowledges" the application of *Rose v. Clark* and [the petitioner] does not take issue with the Court of Appeals' analysis of the record (Gov. Brf. at 7).

The government is wrong on both scores; the petitioner has argued the faulty application of *Rose v. Clark* and the fact that in the face of an overwhelmingly flawed instruction *Rose v. Clark* should not apply (there could be no harmless error here).

II.

CONCLUSION

The trial court found that this case involved violations of the gaming regulations in Nevada (Vol. 52, p. 158). The gaming regulations of Nevada covered some thirteen (13) pages of the Court's charge to the jury and the *sine qua non* of the offenses at bar were the Nevada State Gaming Regulations. There was absolutely no proof that the petitioner ever knew they existed let alone knew of their content and the multiple gaming regulation amendments from 1972 through 1978. The presumption instruction allowed the jury to presume that petitioner knew of the intricacies of these state gaming regulations.

The government, has not seen fit to take issue with any of this, rather they seek refuge under the umbrella of harmless error.

In the case at bar the presumption instruction could never rise to the level of harmless error.

Petitioner urges that the writ of certiorari be granted and that he be granted a new trial.[5]

Respectfully submitted,

ALLAN A. ACKERMAN *
SANTO J. VOLPE

Attorneys for Petitioner
Joseph John Aiuppa

* Counsel of Record

[5] The petitioner would ask leave to incorporate-by-reference the arguments submitted in the companion petitions, 87-1409 (LaPietra); 87-1419 (Cerone); 87-1446 (Lombardo); and 87-1573 (Rockman).